(26,407)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 940.

MARYLAND CASUALTY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 16, 1918.

1 In the Court of Claims.

No. 33,191.

MARYLAND CASUALTY COMPANY, a Corporation,

vs.

THE UNITED STATES.

I. *Petition and Amended Petition.*

The claimant filed its original petition February 8, 1916.

Subsequently, to wit, on May 12, 1916, by leave of Court, the claimant filed its amended petition, which is as follows:

To the Court of Claims:

The claimant in the above-entitled cause respectfully represents to this honorable court as follows:

I.

The claimant is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, having its principal office at Baltimore, in said State, and is now and was at all times hereinafter mentioned engaged in the general business 2 of making and selling casualty, fidelity, guaranty, liability, and surety contracts of insurance of all kinds in the different States and Territories of the United States and elsewhere.

II.

Under the provisions of section 38 of the act of Congress approved August 5, 1909 (36 St. L., 112), entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States and for other purposes," the claimant prepared and filed its returns of net income for the calendar years 1909, 1910, 1911, and 1912 on the forms furnished to it therefor by the Commissioner of Internal Revenue. Claimant endeavored to make its said returns in strict accordance with the requirements of said statute and as true statements of its net income computed in the manner provided by said statute for each of the said years.

III.

In its return for the year ending December 31, 1909, claimant reported as follows: gross income, $4,041,122.75; from which was deducted the following items: all ordinary and necessary expenses,

$1,634,778.63; losses sustained January 1 to December 31, $1,583,427.87; depreciation, $1,233.80; net addition required by law to reserve funds, $458,693.16; domestic taxes, $71,468.55; foreign taxes, $1,181.23; dividends from other tax-paying corporations, $7,020.00; total deductions, $3,757,803.24; net income, $287,319.51; specific deduction, $5,000.00, and taxable income, $282,319.51. Such gross income was calculated as follows:

3 Premiums uncollected December 31, 1908		$584,164.18
Net premiums written in 1909		3,908,795.75
		$4,492,959.93
Less premiums uncollected December 31, 1909		643,162.08
		$3,849,797.85
Interest		151,655.98
Rents		44,675.98
Profit on investments		2,396.25
Reinsurance owed 1909		2,034.55
		$4,050,560.61
Loss on investments	$4,850.75	
Reinsurance owed 1908	4,587.11	
		9,437.86
Gross income		$4,041,122.75

IV.

In its return for the year ending December 31, 1910, the claimant reported as follows: gross income, $4,559,987.82; from which was deducted the following items: all ordinary and necessary expenses, $1,829,461.92; losses sustained January 1 to December 31, $1,998,070.99; depreciation, $1,908.39; net addition required by law to reserve funds, $409,559.41; domestic taxes, $86,239.84; foreign taxes, $3,056.05; dividends from other tax-paying corporations, $5,480.00; total deductions, $4,333,776.60; net income, $226,211.22; specific deduction, $5,000.00; taxable income, $221,211.22.

V.

In its return for the year ending December 31, 1911, claimant reported as follows: gross income, $5,127,374.75; from which
4 was deducted the following items: all ordinary and necessary expenses, $2,055,762.50; losses sustained January 1 to December 31, $2,315,015.84; depreciation, $1,500.51; net addition required by law to reserve funds, $360,510.14; domestic taxes, $113,886.77; foreign taxes, $3,454.35; dividends from other tax-paying corporations, $7,800.00; total deductions, $4,857,930.11; net income, $269,444.64; specific deduction, $5,000.00, and taxable income, $264,444.64.

VI.

In its return for the year ending December 31, 1912, claimant reported as follows: gross income, $5,905,723.32; from which was deducted the following items: all ordinary and necessary expenses, $2,387,489.01; losses sustained January 1 to December 31, $2,683,361.02; depreciation, $940.51; net addition required by law to reserve funds, $670,791.89; domestic taxes, $118,032.62; foreign taxes, $4,129.36; dividends from other tax-paying corporations, $8,325.00; total deductions, $5,873,069.41; net income, $32,653.91; specific deduction, $5,000.00; taxable income, $27,653.91.

VII.

Upon the taxable income reported in these returns taxes of $2,823.20 for 1909, $2,212.11 for 1910, $2,644.45 for 1911, and $276.54 for 1912 were assessed against the claimant and duly paid by it to the representative of the defendants the Collector of Internal Revenue at Baltimore, Maryland, but under written protest that said taxes were not legally due from claimant.

VIII.

Thereafter, on or about March or April, 1913, the Commissioner of Internal Revenue, assuming to act under the statutes of the United States, and especially the aforesaid statute approved August 5, 1909, assessed against this claimant the further sum of $9,609.55 as additional tax on pretended additional net income of this claimant for the said calendar year 1909. Thereafter, on or about April 18, 1913, the claimant appealed to the Commissioner of Internal Revenue for the abatement of said additional tax of $9,609.55, which said appeal was made pursuant to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof. As a result of this appeal $8,771.43 of the assessment was abated and demand made upon this claimant for the payment of the balance of said assessment, amounting to $838.12, with interest at the rate of one per cent per month from the date of the assessment.

The said additional assessment of $838.12 represented one per cent of $83,811.94 erroneously and illegally added to the net income reported by this claimant in its original return of net income. The said additional sum of $83,811.94 was obtained by adding to this claimant's net income reported in its tax return the following: uncollected premiums outstanding December 31, 1909, $643,162.08; increase by adjustment in book value of investments, $60,646.49; reinsurance due other companies December 31, 1908, $4,587.11; disallowance of net addition to reserve funds required by law for unpaid loss claims (except liability claims, net addition to which reserve was allowed), $14,510.99; total, $722,906.67; from which was deducted decrease by adjustment in book value of investments, $52,896.00; reinsurance due other companies December 31, 1909,

$2,034.55; uncollected premiums December 31, 1908, $584,164.18; total, $639,094.73; and balance, $83,811.94.

On November 13, 1913, the claimant voluntarily and under threat of distraint against its property paid the United States Collector of Internal Revenue at Baltimore, Maryland, who made demand for said payment, the said sum of $838.12, together
6 with $58.67 interest, making the total payment $896.79, but
at the same time protesting in writing to the said United States Collector of Internal Revenue that this claimant was not liable for said amount or any part thereof and that said tax and interest was erroneously, illegally and wrongfully assessed and collected from it.

IX.

During the calendar year 1914 the Commissioner of Internal Revenue likewise unlawfully demanded of this claimant the further sum of $1,191.64 as additional tax upon the net income of this claimant for the calendar year 1910. Said sum was exacted at the rate of one per cent on $119,163.95 pretended additional net income of this claimant, arrived at by adding to the net income reported in its tax reurn the following: uncollected premiums outstanding December 31, 1910, $768,917.62; increase by adjustment in book value of assets, $16,128.77; disallowance of net addition to reserve for unpaid loss claims (except liability claims, the net addition to which reserve was allowed), $52,240.00; net addition to reserve for taxes due or accrued, $9,359.39; net addition to reserve for salaries, rents and miscellaneous accounts due or accrued, $15,295.14; from which was deducted decrease in reserve for reinsurance premiums owed other companies, $906.95; balance, $861,034.78; less uncollected premiums on December 31, 1909, $643,162.08; decrease by adjustment in book value of investments, $96,658.75; dividends from other corporations, $2,050.00; and balance, $119,163.95.

On August 11, 1914, the claimant involuntarily and under threat of distraint against its property paid the defendant the said sum of $1,191.64 additional tax for 1910, but at the same time protesting in writing to said United States Collector of Internal Revenue that it was not liable for the same or any part thereof and that said tax was illegally, erroneously, and wrongfully collected from it.

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X.

During the calendar year 1914 the Commissioner of Internal Revenue likewise unlawfully demanded of the claimant the further sum of $2,613.50 as additional tax upon the net income of the claimant for the calendar year 1911. Said sum was exacted at the rate of one per cent on $261,349.58 pretended additional net income of this claimant, arrived at as follows: written premiums, $5,031,810.03; interest and rent, $229,476.44; profit on investments, $6,472.50; increase by adjustment in book values, $42,562.80; making gross income, $5,310,321.77; from which was deducted expenses, $2,048,503.77; loss on investments, $42.50; loss claims paid, $2,310,049.10;

depreciation, $13,799.43; net addition to premium reserve, $247,036.16; net addition to liability reserve, $4,689.32; taxes, $147,607.27; dividends, $7,800.00; making total deduction, $4,779,527.55; and net income, $530,794.22; less $5,000.00 specific deduction, making total taxable income, $525,794.22; less taxable income reported, $264,444.64; making additional income of $261,349.58.

On August 11, 1914, the claimant involuntarily and under threat of distraint against its property paid the defendant the said sum of $2,613.50 additional tax for 1911, but at the same time protesting in writing to said United States Collector of Internal Revenue that it was not liable for the same or any part thereof and that said tax was illegally, erroneously, and wrongfully collected from it.

XI.

During the calendar year 1914 the Commissioner of Internal Revenue likewise unlawfully demanded of this claimant the further sum of $1,990.39, as additional tax upon the net income of this claimant for the calendar year 1912. Said sum was exacted at the rate of one per cent on $199,038.93, pretended additional
8 net income of this claimant, obtained by adding to the net
income reported in its said tax return the following: uncollected premiums outstanding December 31, 1912, $1,020,616.32; increase by adjustment in book value of investments, $21,038.75; disallowance of net addition to unpaid loss claims (except liability claims, the net addition to which reserve was allowed), $50,754.24; net addition to reserve for unpaid commissions, $30,187.78; net addition to reserve for taxes due or accrued, $13,938.20; net addition to reserve for salaries, rents, and miscellaneous accounts due or accrued, $6,585.48; net addition to reserve for reinsurance owed other companies, $9,038.60; from which was deducted uncollected premiums December 31, 1911, $892,755.17, decrease by adjustment in book value of investments, $64,699.67; balance, $199,038.93.

On August 11, 1914, the claimant involuntarily and under threat of distraint against its property paid the defendant the said sum of $1,990.39 additional tax for 1912, but at the same time protesting in writing to said United States Collector of Internal Revenue that it was not liable for the same or any part thereof and that said tax was illegally, erroneously, and wrongfully collected from it.

XII.

Thereafter, on or about April 16, 1915, this claimant appealed to the Commissioner of Internal Revenue for the refund of $896.79 additional tax and interest paid by it for 1909, $1,191.64 additional tax for 1910, $2,613.50 additional tax for 1911, and $1,990.39 additional tax for 1912, and all other taxes illegally collected for said years, not exceeding the total amount of $14,648.62, which appeal was duly made pursuant to the statutes of the United States made and provided in that regard and to the regulations of the Secretary of the Treasury prescribed in pursuance thereof, which said appeal or claim for refund has been rejected by the said Commissioner.

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XIII.

Under the provisions of section 2, paragraph G, of the act approved October 3, 1913 (38 St. L., 172), entitled "An Act to reduce tariff duties and to provide revenue for the Government and for other purposes," claimant prepared and filed its return of net income for the calendar year 1913 on the form furnished it therefor by the Commissioner of Internal Revenue. Claimant endeavored to make its said return in strict accordance with the instructions of the Commissioner of Internal Revenue, so that the said return should show the net income computed according to said instructions.

XIV.

In its said return for the year ending December 31, 1913, claimant reported as follows: gross income, $6,625,014.94; deductions: ordinary and necessary expenses, $2,428,655.95; rentals, etc., $62,144.64; losses, $3,686,010.33; depreciation, $1,064.49; net addition to reserve funds required by law, $266,160.02; interest on United States bonds, etc., $68,515.95; taxes, $127,323.37; foreign taxes, $3,761.44; total deductions, $6,643,636.67; thereby showing that claimant had no taxable income for 1913. The amount of gross income so reported in accordance with the instructions of the said Commissioner of Internal Revenue was computed as follows: net premiums written, $6,185,482.05; interest, $242,692.51; from which was deducted loss from sale of securities, $5,294.95; accrued interest not received, $700.21; loss on real estate, $85.81; net depreciation, $149,330.65; leaving a balance of $6,272,762.94, to which was added released liability reserve for 1913 of $352,252, as if the same had been received in cash during said year, thus making gross income as reported, $6,625,014.94. In this computation the total amount
of premiums written during said year is treated as if actually
10 received, while the actual cash received for premiums during said year was only $6,065,728.08, the difference being $119,753.97 less than the amount used in computing the gross income under the instructions of the Commissioner of Internal Revenue.

XV.

Thereafter the Commissioner of Internal Revenue disallowed the deduction of net addition to all reserve funds, except the unearned premium reserve, the net addition to which amounted to $81,784.67, thus producing a taxable net income for the year amounting to $165,753.62. Included in the gross income upon which this amount of net income was based was the sum of $352,252, which represented the difference in the amount of liability reserve required by law for 1913 as compared with that required for the previous year, and did not represent any part of the moneys received by the claimant during the year 1913 and was not so received by claimant during said year, but was income actually received during 1912 and duly included in the income reported for 1912, the year in which it was actually received. Claimant did not receive any additional income during 1913, because of this item, but notwithstanding included this amount as a part of its gross income, under the head of released liability reserve for 1913, solely on account of the instructions of the said Commissioner of Internal Revenue.

On December 7, 1914, the claimant involuntarily and under threat of distraint against its property paid to said United States Collector of Internal Revenue, who made demand for said payment, the said sum of $1,657.54, but at the same time protesting in writing to said collector that said claimant was not liable for said amount or any part thereof and that said tax was erroneously, illegally, and wrongfully assessed and collected from it.

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XVI.

Thereafter, on or about May 14, 1914, claimant appealed to the Commissioner of Internal Revenue for the refund of $1,657.54 additional tax so paid by it for the year 1913, which appeal was duly made pursuant to the statutes of the United States made and provided in that regard and to the regulations of the Secretary of the Treasury prescribed in pursuance thereof, which said appeal or claim for refund has been rejected by the said Commissioner.

XVII.

At all times hereinbefore mentioned and for many years prior thereto the laws of various of the States in which claimant was transacting business and the regulations of the insurance officials of said States in pursuance thereof have required claimant as a condition to its doing business in said States to maintain reserve funds sufficient to meet all of its outstanding indebtedness. In order that the said insurance officials might be informed as to the proper amounts required to meet all of said outstanding indebtedness and the amounts held by claimant as reserve funds for this purpose claimant has been required to make annual reports to said insurance officials at the close of each of the years hereinbefore referred to showing the amount of business transacted by it during each of said years, and all of its expenses of every character connected therewith, and a statement of its outstanding indebtedness of every character at the end of each of said years and the amount and character of the funds and assets held by it at the end of each of said years as reserve funds from which to meet said outstanding indebtedness. Notwithstanding these legal requirements providing for the maintenance of reserve funds from which to meet claimant's liability for unearned premiums, unsettled loss claims, accrued salaries commissions,
12 taxes, and the remainder of its outstanding indebtedness of every kind and character at the end of each of said years, and notwithstanding the express provisions of the taxing statutes hereinbefore referred to, the said Commissioner of Internal Revenue has not permitted claimant to deduct from its gross income the net additions to its reserve funds for each of said years except for un-

earned premium and liability loss claims reserves, and has also required claimant to pay taxes upon its uncollected premiums at the end of each of said years the same as if these premiums had been collected and claimant had received the additional cash income to the amount of said outstanding uncollected premiums.

XVIII.

The net additions to reserve funds required by law for 1909 to 1913, respectively, as shown by claimant's books, were as follows:

For 1909. Unearned premiums, $205,447.85; loss claims, $14,510.99; liability claims, $238,734.32; brokerage, etc., $22,048.09; taxes, $16,490.35; total, $497,231.60.

For 1910. Unearned premiums, $239,560.21; loss claims, $52,240.81; liability claims, $94,010.81; brokerage, etc., $42,389.46; taxes, $9,359.39; salaries, etc., $15,846.28; total, $453,406.96.

For 1911. Unearned premiums, $247,036.16; loss claims, $79,107.82; liability claims, $4,689.32; brokerage, etc., $25,746.97; taxes, $9,474.86; reinsurance, $1,697.38; total, $367,752.51.

For 1912. Unearned premiums, $329,532.89; loss claims, $50,754.24; liability claims, $226,420.00; brokerage, etc., $34,522.51; taxes, $13,938.20; salaries, etc., $6,585.45; reinsurance, $9,038.60; total, $670,791.89.

For 1913. Unearned premiums, $81,784.67; loss claims, $157,800.20; brokerage, etc., $14,087.64; taxes, $6,676.31; salaries, etc., $3,690.83; reinsurance, $2,120.37; total, $266,160.02.

13 Wherefore, the premises considered, your petitioner prays judgment against the United States in the full sum of ($16,306.16) sixteen thousand three hundred and six dollars and sixteen cents, further averring that it is and has always been the sole owner of the claims hereinbefore referred to and has not assigned or transferred the whole or any part thereof or interest therein, and that it has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that it believes the facts as stated herein to be true, and that it is justly entitled to the said amount from the United States after allowing all just credits and offsets.

MARYLAND CASUALTY COMPANY,
By SERVEN & JOYCE, by A. R. SERVEN,
Its Attorneys.

CITY OF WASHINGTON,
District of Columbia, ss:

Before me, W. B. Jaynes, a notary public in and for said District of Columbia, A. R. Serven personally appeared and made oath before me that he is a member of the firm of Serven & Joyce, whose name is written as a part of the signature of the foregoing petition, and that said firm is the duly authorized attorney-in-fact of said Maryland Casualty Company for the purpose of executing and verifying said petition, and that the allegations therein made of his own knowledge are true, and that the allegations therein made on information and belief he believes to be true.

A. R. SERVEN.

Subscribed and sworn to before me this 12th day of May, A. D. 1916.

[SEAL.]

W. B. JAYNES,
Notary Public.

14 II. *General Traverse.*

Court of Claims.

No. 33191.

MARYLAND CASUALTY COMPANY, a Corporation,
vs.
THE UNITED STATES.

No demurrer, plea, or answer having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

15 III. *Argument and Submission of Case.*

On December 13, 1916 the case was argued and submitted on merits by Mr. A. R. Serven, for the claimant, and Mr. G. M. Anderson, for the defendants.

IV. *Findings of Fact and Opinion by Booth, J.*

Filed February 12, 1917.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant is a citizen of the United States, and is a corporation existing under and by virtue of the laws of the State of Maryland, and is engaged in the business of making and selling casualty, fidelity, guaranty, liability, and surety insurance of all kinds in the different States and Territories of the United States and elsewhere, and has been so transacting such insurance business at all times since 1898, having its principal office at Baltimore, in said State, and is the owner of the claims in question, and has neither assigned nor sold them in whole or in part.

II.

Returns were made by the claimant company to the Commissioner of Internal Revenue for the years 1909, 1910, 1911, and 1912, under section 38 of the act of August 5, 1909 (36 Stat., 112), and for the year 1913, under section 2, Division G, of the act of October 3, 1913 (38 Stat., 172).

Suit was filed under the general jurisdiction of the court on February 8, 1916, and an amended petition was filed on May 12, 1916.

III.

The return for the year 1909:

1909—Original.

1. Total amount of paid-up stock outstanding at close of year		$750,000.00
2. Total amount of bonded or other indebtedness outstanding at close of year		None.
3. Gross income (see Note A)		4,041,122.75

16 DEDUCTIONS.

4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation (see Note B)	$1,634,778.63	
5. (*a*) Total amount of losses sustained January 1 to December 31	1,583,427.87	
(*b*) Total amount of depreciation January 1 to December 31	1,233.80	
(*c*) Total amount other than dividends paid within the year on policy and annuity contracts	....	
(*d*) Total amount of net addition required by law to be made within the year to reserve fund	458,693.16	
Total (see Note B)	....	
6. Total amount of interest January 1 to December 31 on bonded indebtedness to an amount not to exceed amount of paid-up capital at close of year (see Note B)	....	
7. (*a*) Total taxes paid January 1 to December 31 imposed under authority of the United States or any State or Territory thereof	$71,468.55	
(*b*) Foreign taxes paid	1,181.23	
Total (see Note B)	....	
8. Amount received by way of dividends upon stock of other corporations, joint stock companies, associations, and insurance companies subject to this tax	$7,020.00	
Total deductions		$3,757,803.24
9. Net income		287,319.51
10. Specific deductions from net income allowed by law		5,000.00
11. Amount on which tax at 1 per cent is to be calculated for assessment		282,319.51

The gross income in original return was made up of the following items:

Premiums in course of collection by agents unreported December 31, 1908, reported to the company paid in 1909		$584,164.18
Net premiums written in 1909		3,908,795.75
Interest paid to the company in 1909		151,655.98
Real estate income received in 1909		44,675.98
Profit on sale of securities in 1909		2,396.25
Reinsurance due other companies December 31, 1909		2,034.55
		4,693,722.69
Less:		
Premiums in course of collection by agents not reported to the company December 31, 1909	$643,162.08	
Loss on sale of securities in 1909	4,850.75	
Reinsurance due other companies December 31, 1908, paid in 1909	4,587.11	
		652,599.94
		4,041,122.75

17 The total amount of net addition to reserve funds stated in the original return was made up of increases in liabilities as follows:

Unearned premiums	$205,447.85
Loss claims	14,510.99
Special reserve for unpaid liability claims	238,734.32
	458,693.16

There was paid on the original return of income a tax of $2,823.20 on June 8, 1910. The amount that should have been paid was $2,783.20, or $40 less.

After the payment of the above tax the Commissioner of Internal Revenue made out, as provided by law, an amended return, as follows:

1909—Amended.

1. Total amount of paid-up stock outstanding at close of year		$750,000.00
2. Total amount of bonded or other indebtedness outstanding at close of year		None.
3. Gross income (see Note A)		4,752,334.63

DEDUCTIONS.

4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation (see Note B)	$1,921,206.37
5. (*a*) Total amount of losses sustained January 1 to December 31	None.
(*b*) Total amount of depreciation January 1 to December 31	None.
(*c*) Total amount other than dividends paid within the year on policy and annuity contracts	1,298,233.93
(*d*) Total amount of net addition required by law to be made within the year to reserve fund	208,950.10

6. Total amount of interest January 1 to December 31 on bonded indebtedness to an amount not to exceed amount of paid-up capital at close of year (see Note B)	....	
7. (*a*) Total taxes paid January 1 to December 31 imposed under authority of the United States or any State or Territory thereof	72,649.78	
(*b*) Foreign taxes paid	....	
8. Amount received by way of dividends upon stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax	7,020.00	
Total deductions		3,508,060.18
9. Net income		1,244,274.45
10. Specific deductions from net income allowed by law		5,000.00
11. Amount on which tax at 1 per cent is to be calculated for assessment		1,239,274.45
(Original income)		278,319.51
Additional income		960,954.94
Additional tax		9,609.55

18 The gross income stated in the amended return was made up of the following items:

Premiums in course of collection by agents unreported December 31, 1908, reported to the company paid in 1909	$584,164.18
Premiums written for 1909 to include December 31, 1909	3,908,795.75
Interest paid to the company in 1909	151,655.98
Real estate income received in 1909	44,675.98
Profit on sale of securities in 1909	2,396.25
Increase in value of securities, book values, by appraisal	60,646.49
	4,752,334.63

The gross income and deductions in the amended return were made up from the report of the claimant to the State Insurance Commissioner of Maryland, and after examination of the company's books by a revenue agent under the direction of the Commissioner of Internal Revenue, but there was an error made in the net addition to reserve fund (unearned premium reserve), which should have been $205,447.85, and the error was corrected in the abatement claim as shown hereafter.

Credit was allowed on the amended return for the tax theretofore paid except for an error of $40, which was not so credited, as shown above, and an additional tax of $9,609.55 was assessed February 27, 1913, against the claimant, which, on April 15, 1913, filed with the Commissioner of Internal Revenue a claim for the abatement of the same.

The abatement claim was allowed for the following items:

Premiums in course of collection by agents unreported December 31, 1908, reported paid in 1909	$584,164.18
Increase in liability for unpaid liability losses	238,734.32
Loss on sale of securities	4,850.75
Decrease in value of securities, book values, by appraisement	52,896.00
	880,645.25
Less difference between $208,950.10 and $205,447.85 error in computing net addition to unearned premium reserve in amended return	3,502.25
	877,143.00

The additional tax was, therefore, remitted in the sum of $8,771.43.

The abatement claim was rejected October 30, 1913, for the following items:

Difference between reinsurance owed other companies December 31, 1908, $4,587.11 paid in 1909, and reinsurance owed other companies December 31, 1909, $2,034.55	$2,552.56
Increase in premiums in course of collection by agents unreported December 31, 1909, over same in hands of agents December 31, 1908 (changing cash basis to written basis)	58,997.90
Net addition to loss claims reserve	14,510.99
Appreciation over depreciation in securities, book values, by appraisement (appreciation $60,646.49, depreciation $52,896)	7,750.49
	83,811.94

An additional tax of $838.12 was collected on the amount of the items of the abatement claim rejected, which was paid by the claimant, with $58.67 interest, amounting to $896.79, November 13, 1913.

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IV.

The return for 1910:

1910—Original.

3. Gross income (see Note A)		$4,559,987.82
DEDUCTIONS.		
4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation (see Note B)	$1,829,461.92	
5. (*a*) Total amount of losses sustained January 1 to December 31	1,998,070.99	
(*b*) Total amount of depreciation January 1 to December 31	1,908.39	
(*c*) Total amount other than dividends paid within the year on policy and annuity contracts		
(*d*) Total amount of net addition required by law to be made within the year to reserve fund	409,559.41	
Total (see Note B)		

6. Total amount of interest January 1 to December 31 on bonded indebtedness to an amount not to exceed amount of paid-up capital at close of year (see Note B)		
7. (*a*) Total taxes paid January 1 to December 31 imposed under authority of the United States or any State or Territory thereof	86,239.84	
(*b*) Foreign taxes paid	3,056.05	
Total (see Note B)		
8. Amount received by way of dividends upon stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax	5,480.00	
Total deductions		4,333,776.60
9. Net income		226,211.22
10. Specific deductions from net income allowed by law		5,000.00
11. Amount on which tax at 1 per cent is to be calculated for assessment		221,211.22

The gross income stated in the original return was made up of the following items:

Premiums in course of collection by agents unreported December 31, 1909, reported paid in 1910		$643,162.08
Net premiums written in 1910		4,488,755.68
Interest and profit on sale of securities in 1910		198,514.00
Interest accrued 1909, paid 1910		25,397.50
		5,355,829.26
Less:		
Premiums in course of collection by agents December 31, 1910, not reported to company	$768,917.62	
Interest accrued, 1910	26,923.82	
		795,841.44
		4,559,987.82

20 The total amount of net addition to reserve funds stated in the original return was made up of the following increases in liabilities:

Unearned premiums	$239,560.21
Loss claims	52,240.81
Special reserve for unpaid liability losses	94,010.81
Unpaid taxes	9,359.39
Unpaid salaries, etc	15,295.14
	410,466.36
Less decrease in reinsurance due other companies	906.95
	409,559.41

On the income stated in the original return a tax of $2,212.11 was paid on June 27, 1911.

Thereafter the Commissioner of Internal Revenue, as provided by law, based upon the report of the claimant to the State insurance commissioner of Maryland and an examination of the company's books by a revenue agent under the direction of the Commissioner of Internal Revenue, made out an amended return as follows:

1910—Amended.

1. Total amount of paid-up stock outstanding at close of year		$1,000,000.00
2. Total amount of bonded or other indebtedness outstanding at close of year		None.
3. Gross income (see note A)		4,722,534.54
DEDUCTIONS.		
4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation (see Note B)	$1,826,772.35	
5. (*a*) Total amount of losses sustained January 1 to December 31	12.50	
(*b*) Total amount of depreciation January 1 to December 31	96,658.75	
(*c*) Total amount other than dividends paid within the year on policy and annuity contracts	1,993,520.99	
(*d*) Total amount of net addition required by law to be made within the year to reserve fund	333,571.02	
6. Total amount of interest, January 1 to December 31, on bonded indebtedness to an amount not to exceed amount of paid-up capital at close of year (see Note B)	....	
7. (*a*) Total taxes paid January 1 to December 31, imposed under authority of the United States or any State or Territory thereof	119,093.76	
(*b*) Foreign taxes paid	....	
8. Amount received by way of dividends upon stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax	7,530.00	
Total deductions		4,377,159.37
9. Net income		345,375.17
10. Specific deductions from net income allowed by law		5,000.00
11. Amount on which tax at 1 per cent is to be calculated for assessment		340,375.17

1 (Original income)	$221,211.22
Additional income	119,163.95
Additional tax	1,191.64

The gross income stated in the amended return was made up of he following items:

et premiums written in 1910	$4,488,755.68
nterest and rent paid in 1910	217,050.09
rofit on sales of securities in 1910	600.00
ncrease in value of securities, book values, by appraisement	16,128.77
	4,722,534.54

The total amount of net addition to reserve fund stated in the amended return was made up of increase in the following liabilities:

Unearned premiums	$239,560.21
Unpaid liability losses	94,010.81
	333,571.02

On the amended return credit was given for the tax theretofore paid on the original return, leaving an additional taxable income of $119,163.95, which was made up of the following items:

Increase in course of collections by agents unreported December 31, 1910, over same in hands of agents December 31, 1909 (to place premiums on net written basis)		$125,755.54
Increase in liability for loss claims (cut out of deductions in original return and added to income)		52,240.81
Increase in liability for taxes due or accrued (cut out of original return and added to income)		9,359.39
Increase in liability for unpaid salaries, etc. (cut out of original return and added to income)		15,295.14
		202,650.88
Less:		
Excess of depreciation, $96,658.75, over appreciation, $16,128.77, book values, by appraisement	$80,529.98	
Error in deducting full amount of dividends received from corporation, subject to like tax	2,050.00	
Decrease in liability for reinsurance	906.95	
		83,486.93
		119,163.95

On the amended return an additional tax of $1,191.64 was assessed against the claimant, which was paid on August 11, 1914.

V.

The return for 1911:

1911—Original.

1. Total amount of paid-up stock outstanding at close of year		$1,000,000.00
2. Total amount of bonded or other indebtedness outstanding at close of year		None.
3. Gross income (see Note A)		5,127,374.75
DEDUCTIONS.		
4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation (see Note B)	$2,055,762.50	

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5. (*a*) Total amount of losses sustained January 1 to December 31	$2,315,015.84	

(*b*) Total amount of depreciation January 1 to December 31	1,500.51	
(*c*) Total amount other than dividends paid within the year on policy and annuity contracts	....	
(*d*) Total amount of net addition required by law to be made within the year to reserve fund	360,510.14	
6. Total amount of interest January 1 to December 31 on bonded indebtedness to an amount not to exceed amount of paid-up capital at close of year (see Note B)	....	
7. (*a*) Total taxes paid January 1 to December 31 imposed under authority of the United States or any State or Territory thereof	113,886.77	
(*b*) Foreign taxes paid	3,454.35	
8. Amount received by way of dividends upon stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax	7,800.00	
Total deductions		$4,857,930.11
9. Net income		269,444.64
10. Specific deductions from net income allowed by law		5,000.00
11. Amount on which tax at 1 per cent is to be calculated for assessment		264,444.64

The gross income stated in the original return was made up of the following items:

Premiums in course of collection by agents unreported December 31, 1910, reported to company paid in 1911		$768,917.62
Net premiums written in 1911		5,031,810.03
Interest and profit on securities sold in 1911		222,159.16
Interest accrued in 1910 paid in 1911		26,923.82
		6,049,810.63
Less:		
Premiums in course of collection by agents December 31, 1911, not reported to company	$892,755.17	
Interest accrued in 1911	29,680.71	
		922,435.88
		5,127,374.75

The total amount of net addition to reserve funds stated in original return was made up of the following increases in liabilities:

Unearned premiums	$247,036.16
Loss claims	79,107.82
For unpaid liability losses	4,689.32
Brokerage, etc.	25,746.97
Taxes due or accrued	9,474.86
Reinsurance due other companies	1,697.38
	367,752.51
Less decrease in liability for unpaid salaries, etc.	7,242.37
	360,510.14

23 On the income as stated in the original return a tax of $2,644.45 was paid on June 29, 1912.

Thereafter an amended return, as provided by law, based upon the report of the claimant to the State insurance commissioner of Maryland and an examination of the company's books by a revenue agent under the direction of the Commissioner of Internal Revenue, was made out by the Commissioner of Internal Revenue, as follows:

1911—Amended.

1. Total amount of paid-up stock outstanding at close of year		$1,000,000.00
2. Total amount of bonded or other indebtedness outstanding at close of year		None.
3. Gross income (see Note A)		5,310,321.77
DEDUCTIONS.		
4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation (see Note B)	$2,048,503.77	
5. (*a*) Total amount of losses sustained January 1 to December 31	42.50	
(*b*) Total amount of depreciation January 1 to December 31	13,799.43	
(*c*) Total amount other than dividends paid within the year on policy and annuity contracts	2,310,049.10	
(*d*) Total amount of net addition required by law to be made within the year to reserve fund	251,725.48	
6. Total amount of interest January 1 to December 31 on bonded indebtedness to an amount not to exceed amount of paid-up capital at close of year (see Note B)	....	
7. (*a*) Total taxes paid January 1 to December 31 imposed under authority of the United States or any State or Territory thereof	147,607.27	
(*b*) Foreign taxes paid	....	
8. Amount received by way of dividends upon stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax	7,800.00	
Total deductions		4,779,527.55
9. Net income		530,794.22
10. Specific deductions from net income allowed by law		5,000.00
11. Amount on which tax at 1 per cent is to be calculated for assessment		525,794.22
(Original return)		264,444.64
Additional income		261,349.58
Additional tax		2,613.50

The gross income stated in the amended return was made up as follows:

Net premiums written in 1911	$5,031,810.03
Interest and rent paid in 1911	229,476.44
Profit on sales made in 1911	6,472.50
Increase in value of securities, book values, by appraisement	42,562.80
Total	5,310,321.77

24 On the amended return the tax theretofore paid on the original return was credited.

The additional income was made up of increase in premiums in course of collection and the following increases in liabilities:

Increase in premiums in course of collection by agents unreported December 31, 1911, over same in hands of agents December 31, 1910		$123,837.55
Loss claims (cut out of deductions in original return and added to income)		79,107.82
Nonpaid brokerage, etc. (cut out of deductions in original return and added to income)		25,746.97
Unpaid taxes (cut out of deductions in original return and added to income)		9,474.86
Reinsurance owed other companies (cut out of deductions in original return and added to income)		1,697.38
Excess of appreciation over depreciation in value of securities $42,562.80—$13,799.43), book values, by appraisement		28,763.37
		268,627.95
Less:		
Decrease in liability for unpaid salaries	$7,242.37	
Error in computation	36.00	
		7,278.37
		261,349.58

An additional tax of $2,613.50 was assessed against the claimant, which was paid on August 11, 1914.

VI.

The return for the year 1912:

1912—Original.

1. Total amount of paid-up stock outstanding at close of year		$1,000,000.00
2. Total amount of bonded or other indebtedness outstanding at close of year		None.
3. Gross income (see Note A)		5,905,723.32

DEDUCTIONS.

4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation (see Note B)	$2,387,489.01	
5. (*a*) Total amount of losses sustained January 1 to December 31	2,683,361.02	
(*b*) Total amount of depreciation January 1 to December 31	940.51	

(*c*) Total amount other than dividends paid within the year on policy and annuity contracts	Nil.	
(*d*) Total amount of net addition required by law to be made within the year to reserve fund	670,791.89	
6. Total amount of interest January 1 to December 31 on bonded indebtedness to an amount not to exceed amount of paid-up capital at close of year (see Note B)	Nil.	
7. (*a*) Total taxes paid January 1 to December 31 imposed under authority of the United States or any State or Territory thereof	118,032.62	

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(*b*) Foreign taxes paid	$4,129.36	
8. Amount received by way of dividends upon stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax	8,325.00	
Total deductions		$5,873,069.41
9. Net income		32,653.91
10. Specific deductions from net income allowed by law		5,000.00
11. Amount on which tax at 1 per cent is to be calculated for assessment		27,653.91

The gross income stated in the original return was made up of the following items:

Premiums in course of collection by agents unreported December 31, 1911, reported to company paid in 1912	$892,755.17
Net premiums written in 1912	5,823,736.06
Interest and profit on sale of securities in 1912	209,772.86
Real estate income other than home office for 1912	75.55
	6,926,339.64
Less premiums in course of collection by agents, December 31, 1912, not reported to company	1,020,616.32
Total	5,905,723.32

The total amount of net addition to reserve funds stated in the original return was made up of the following increases in liabilities:

Unearned premiums	329,532.89
Loss claims	50,754.24
For unpaid liability losses	226,420.00
Unpaid brokerage, etc.	34,522.51
Taxes due or accrued	13,938.20
Unpaid salaries, etc.	6,585.45
Reinsurance due other companies	9,038.00
	670,791.89

On the original return of income a tax of $276.54 was paid on June 10, 1913.

Thereafter an amended return, as provided by law, based upon the report of the claimant to the State Insurance Commissioner of Maryland and an examination of the company's books by a revenue agent under the direction of the Commissioner of Internal Revenue, was made out by the Commissioner of Internal Revenue as follows:

1912—Amended.

1. Total amount of paid-up stock outstanding at close of year		$1,000,000.00
2. Total amount of bonded or other indebtedness outstanding at close of year		None.
3. Gross income (see Note A)		6,117,830.24
DEDUCTIONS.		
4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation (see Note B)	$2,420,757.28	
5. (*a*) Total amount of losses sustained January 1 to December 31	472.50	
(*b*) Total amount of depreciation January 1 to December 31	64,699.97	

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(*c*) Total amount other than dividends paid within the year on policy and annuity contracts	$2,678,810.98	
(*d*) Total amount of net addition required by law to be made within the year to reserve fund	555,952.89	
6. Total amount of interest January 1 to December 31 on bonded indebtedness to an amount not to exceed amount of paid-up capital at close of year (see Note B)	None.	
7. (*a*) Total taxes paid January 1 to December 31 imposed under authority of the United States or any State or Territory thereof	157,118.78	
(*b*) Foreign taxes paid	....	
8. Amount received by way of dividends upon stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax	8,325.00	
Total deductions		$5,886,137.40
9. Net income		231,692.84
10. Specific deductions from net income allowed by law		5,000.00
11. Amount on which tax at 1 per cent is to be calculated for assessment		226,692.84
(Original income)		27,653.91
Additional income		199,038.93
Additional tax		1,990.39

The gross income stated in the amended return was as follows:

Net premiums written in 1912	$5,823,736.06
Interest and rent paid in 1912	271,207.38
Profit on sales made in 1912	1,848.05
Increase in value of securities, book values by appraisement	21,038.75
Total	6,117,830.24

On the amended return credit was given for the taxes theretofore paid on the original return. The additional taxable income of $199,038.93 was made up of the following items:

Increase in premiums in course of collection by agents unreported December 31, 1912, over same in hands of agents December 31, 1911	$127,861.15
Increase in liability for loss claims (cut out of deductions in original return and added to income)	50,754.24
Increase in liability for unpaid brokerage, etc. (cut out of deductions in original return and added to income)	34,522.51
Increase in liability for taxes due and to become due (cut out of deductions in original return and added to income)	13,938.20
Increase in liability for unpaid salaries, etc. (cut out of deductions in original return and added to income)	6,585.45
Increase in liability for reinsurance due other companies (cut out of deductions in original return and added to income)	9,038.60
	242,700.15
Less excess of depreciation, $64,699.97; overappreciation, $21,038.75, in securities, book values, by appraisement	43,661.22
	199,038.93

An additional tax of $1,990.39 was assessed against the claimant, which was paid on August 11, 1914.

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VII.

The return for the year 1913:

1913—Original.

1. Total amount of paid-up capital stock outstanding, or, if no capital stock, the capital employed in business, at close of the year above stated (see Note 8 on reverse of this form)	$1,000,000.00
2. Total amount of bonded and other indebtedness outstanding at close of year (see Note 9)	None.
3. Gross income (see Note A, and instructions, paragraphs 10, 18, 21, 22, 23, 25, and 26)	6,625,014.94

DEDUCTIONS.

4. (*a*) Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation exclusive of interest payments (see Note B)	$2,428,655.95	

(*b*) All rentals or other payments required to be made as a condition to the continued use or possession of the property (see Note 12 on reverse of this form)	62,144.64	
5. (a) Total amount of losses sustained during the year not compensated by insurance or otherwise	3,686,010.23	
(*b*) Total amount of depreciation for the year (see Note 13)	1,064.97	
(*c*) Total amount (other than dividends) paid within the year on policy and annuity contracts	None.	
(*d*) Total amount of net addition required by law to be made within the year to reserve fund (see Note 28)	266,160.02	
(*e*) Amounts of premiums repaid to policyholders and interest paid thereon (applicable only to mutual marine insurance companies)	None.	
6. (*a*) Total amount of interest accrued and paid within the year on an amount of bonded or other indebtedness not exceeding one-half of the sum of its interest-bearing indebtedness and its paid-up capital stock outstanding at the close of the year	None.	
(*b*) Total amount of interest received upon obligations of a State or political subdivision thereof and upon the obligations of the United States or its possessions	68,515.95	
7. (*a*) Total taxes paid during the year imposed under authority of the United States or any State or Territory thereof (see Note 20)	127,323.37	
(*b*) Foreign taxes paid	3,761.44	
Total deductions		6,643,636.67
8. Net income on which tax at 1 per cent is calculated		None.

28 The gross income stated in the original return was made up of the following items:

Net premiums written in 1913	$6,185,482.05
Interest on bonds and dividends on stocks paid in 1913	186,275.93
Gross rents ($56,680.60 less $6,344.99)	50,335.61
Decrease 1913 of special reserve for unpaid liability losses	352,252.00
	6,774,345.59
Less depreciation of stock	149,330.65
	6,625,014.94

The total amount of net addition to reserve fund stated in the deductions in the original return was made up of increases in liabilities, as follows:

Unearned premiums	$81,784.67
Loss claims	157,800.20
Unpaid brokerage, etc.	14,087.64
Taxes due or accrued	6,676.31
Unpaid salaries, etc.	3,690.83
Reinsurance due other companies	2,120.37
	266,160.02

The original return showed no taxable income but a deficit of $18,621.73. Thereupon the Commissioner of Internal Revenue made out, as provided by law, based upon the report of the claimant to the State Insurance Commissioner of Maryland, and an examination of the company's books by a revenue agent under the direction of the Commissioner of Internal Revenue, an amended return, as follows:

1913—Amended.

1. Total amount of paid-up capital stock outstanding, or, if no capital stock, the capital employed in business, at close of the year above stated (see Note 8 on reverse of this form)		$1,000,000.00
2. Total amount of bonded and other indebtedness outstanding at close of year (see Note 9)		None.
3. Gross income (see Note A and instructions, paragraphs 10, 18, 21, 22, 23, 25, and 26)		6,717,361.97

DEDUCTIONS.

4. (*a*) Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation, exclusive of interest payments (see Note B)	$3,042,046.24	
(*b*) All rentals or other payments required to be made as a condition to the continued use or possession of the property (see Note 12 on reverse of this form)	62,144.64	
5. (*a*) Total amount of losses sustained during the year not compensated by insurance or otherwise	6,377.67	
(*b*) Total amount of depreciation for the year (see Note 13)	167,786.71	
(*c*) Total amount (other than dividends) paid within the year on policy and annuity contracts	3,073,652.33	
(*d*) Total amount of net addition required by law to be made within the year to reserve fund (see Note 28)	None.	

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(*e*) Amounts of premiums repaid to policy holders and interest paid thereon (applicable only to mutual marine insurance companies)	None.	
6. (*a*) Total amount of interest accrued and paid within the year on an amount of bonded or other indebtedness not exceeding one-half of the sum of its interest-bearing indebtedness and its paid-up capital stock outstanding at the close of the year	None.	
(*b*) Total amount of interest received upon obligations of a State or political subdivision thereof and upon the obligations of the United States or its possessions	$68,515.95	

7. (*a*) Total taxes paid during the year imposed under authority of the United States or any State or Territory thereof (see Note 20)	127,323.37	
(*b*) Foreign taxes paid	3,761.44	
Total deductions		$6,551,608.35
8. Net income on which tax at 1 per cent is calculated		165,753.62
Original income		None.
Tax		1,657.54

The gross income stated in the amended return was made up of the following items:

Net premiums written in 1913		$6,185,482.05
Gross interest on mortgage loans		248.50
Gross interest on bonds and dividends on stocks paid in 1913		186,275.93
Gross interest on deposits in trust companies and banks in 1913		1,979.26
Interest on bills receivable in 1913		1,994.05
Gross rent from company's property		114,220.92
Gross profits on sale of bonds and stocks in 1913		1,082.72
Increase in value of securities, book values by appraisement		18,456.06
Decrease in special reserve for unpaid liability losses over increase in unearned premium reserve, called released reserve ($352,252—$81,784.67)		270,467.33
		6,780,206.82
Less:		
Rent of building owned by company and used as office building	$62,144.64	
Rent accrued in 1913	700.21	
		62,844.85
		6,717,361.97

The additional taxable income stated in the amended return was made up entirely of the following increases in liabilities:

Loss claims	$157,800.20
Unpaid brokerage, etc.	14,087.64
Unpaid taxes	6,676.31
Unpaid salaries, etc.	3,690.83
Reinsurance owed other companies	2,120.37
	184,375.35
Less deficit in income reported in original return	18,621.73
	165,753.62

30 The above increases in liabilities were cut out of the net addition to reserve fund stated in deductions in the original return for 1913 and added to income.

On the income reported in the amended return an additional tax of $1,657.54 was assessed and paid on December 7, 1914.

VIII.

On September 18, 1913, the Commissioner of Internal Revenue notified the claimant of the proposed assessment of an additional excise tax of $1,191.64 for 1910, $2,613.50 for 1911, and $1,990.39 for 1912, aggregating $5,795.53, and gave the company until October 5, 1913, to file satisfactory proof that such additional tax had been erroneously charged, which time was further extended to October 30, 1913.

On October 3, 1913, the treasurer of the claimant company addressed a communication to the commissioner calling his attention to letters dated June 19 and June 26, 1913, which had been filed with the abatement claim objecting to the additional tax for 1909, the said letters containing general objections to the assessment of the excise tax on the written basis and to the disallowance of net additions to reserves other than unearned premium reserve and special reserve for unpaid liability losses; but no claim for the refund of any of the original taxes collected for those years had been then filed.

On August 14, 1914, a claim was filed by the company for the refund of the additional tax collected for 1909. On the same day, August 14, 1914, a claim was also filed by the company for the refund of the additional taxes collected for the years 1910, 1911, and 1912. On April 30, 1915, a claim for $14,648.62, total taxes and interest for 1909–1912, was filed, setting out a specific claim for the refund of the additional excise taxes for the years 1909 to 1912, inclusive, followed by this general language, "The claimant also asks for the refund of all amounts paid by it as taxes which, through lack of information as to the requirements of the law or by error in computation, it may have paid in excess of the amounts legally due." On May 11, 1915, a specific claim was filed for the refund of additional income tax for the year 1913. All of the additional taxes for 1909 to 1913, inclusive, and the original taxes for 1909, were paid under protest.

All the claims for refund of said taxes were rejected by the Commissioner of Internal Revenue subsequent to the institution of this suit and prior to the filing of the amended petition.

IX.

The claimant company in its reports to the State insurance departments for the years 1909 to 1913, inclusive, reported net written premiums in its gross income as "net cash received for premiums." Such written premiums contained for each year a large amount representing premiums "in course of collection" in the hands of agents from whom no reports had been received as to the amount collected; so that it was unknown to the company how much of said premiums had been collected or how much remained to be collected at the
time of making its said reports. The amounts reported to the
31 State insurance departments as "in course of collection" December 31 of each year were not reported to the company as
paid or canceled until some time in February of the following year.

All of the other items of gross income were reported to the State insurance departments on the paid-for basis except "gross increase, by adjustment in book values of ledger assets," which were simply estimates at the end of the year of the value of its securities or ledger assets. All of the liabilities for which it is claimed reserves must be maintained except "special reserve for unpaid liability losses" were set out in said reports to the State insurance departments as "liabilities" on the due or accrued basis and not as "reserves." In all of the States where the claimant did business the State excise taxes were collected on net premiums written, except in Maryland, where a license fee of $1,500 was collected.

X.

The Government, in carrying into effect the excise and income tax laws, assessed the tax on the cash or paid basis as to the income or any part of it which was reported to the State insurance departments on the paid basis, and on the written or accrued basis as to the income or any part of it which was reported to the State insurance departments on the written or accrued basis.

XI.

The reserves kept by the claimant company, as required by the State statutes and the rules and regulations of the State insurance officers, were not kept in separate or special funds and treated as trust funds but were invested in securities approved by State insurance officers. The examinations of claimant company, by State insurance examiners, were for the purpose of ascertaining the financial condition of the company, and whether it had complied with the requirements of the State statutes and the rules and regulations of State insurance departments.

XII.

The insurance department of the State of Pennsylvania, in which claimant does business, in pursuance of the act of 1873 (P. L., 20), and the act of May 1, 1876 (P. L., 53), the act of June 1, 1911 (P. L., 607) [Statutes of Pennsylvania], the latter act making no change in the department's rulings but more specifically defining them, has at all times since 1909, inclusive, required claimant to keep on hand, as a condition to its doing business in Pennsylvania, assets as reserves sufficient to cover outstanding losses, unearned premiums, and all other claims against the company, whether due or accrued.

The insurance department of the State of New York in which claimant does business, made in pursuance of sections 86, 41, 39, 44, 45, 48 of the New York insurance laws of 1907, has at all times since 1909, inclusive, required claimant to maintain reserve funds sufficient in amount and satisfactory in kind to meet all of its accrued, but unpaid, indebtedness.

32 The insurance department of the State of Massachusetts in which claimant does business, in pursuance of section 87,

chapter 576, acts of 1906, Massachusetts insurance laws, has at all times since 1909, inclusive, required claimant to hold or reserve assets for the payment of all claims and obligations against it.

The insurance department of the State of Wisconsin in which claimant does business, in pursuance of section 1966–47 of the Wisconsin statutes of 1898, which authorize the commissioner of insurance in computing the reserve liability of casualty companies to make such computations as in his judgment are equitable and just to both policyholder and the company, has always, since 1909, inclusive, required claimant to carry sufficient reserves to cover all of its outstanding liabilities, as set forth in its annual State reports.

XIII.

The instructions printed upon the blank forms of returns of income as issued by the Commissioner of Internal Revenue to the claimant for each of the years from 1909 to 1912, inclusive, and pursuant to which the claimant so reported, included, among other things not material here, the following:

"NOTE A.—The gross income shall consist of the total of the gross revenue derived from the operation and management of its business and properties, together with all amounts of income, including dividends on stock of other corporations, joint-stock companies, and associations subject to this tax, derived from all sources, as shown by the entries on its books from January 1 to December 31 of the year for which return is made.

"NOTE B.—The deductions authorized shall include all expense items, under the various heads, acknowledged as liabilities by the corporation making the return and entered on its books from January 1 to December 31."

The instructions printed upon the blank forms of return of income issued by the Commissioner of Internal Revenue to the claimant for the year 1913, and pursuant to which the claimant so reported, included, among other things not material here, the following:

"NOTE A.—Gross income of insurance companies shall consist of the total of the gross revenues derived from the operation and management of their businesses and properties, together with all amounts of income from other sources, including dividends on stock of other organizations, whether subject to this tax or not, premiums, interest, rentals, and all items of income resulting from appraisement or adjustment, and shown by entries upon the books during the year for which the return is made.

"Mutual marine insurance companies may exclude from the gross premiums collected the 'amounts paid for reinsurance,' including the remainder in gross income.

"NOTE B.—The deductions authorized shall include all expense items under the various heads acknowledged as liabilities by the corporation making the return and entered upon its books during the year."

XIV.

The decrease in the employers' liability loss reserve for 1913 designated as "released reserve" did not in any respect affect or change claimant's gross income or disbursements, as shown by the State Insurance Reports.

The said "released reserve" was added to claimant's income in its tax return for 1913 by direction of the officials of the Government, under the ruling of the department, that released reserve must be regarded as additional income, and taxed by the Government, on the ground that said released reserve had escaped taxation in previous years by being included in the net addition to reserve funds required by law, the latter being an allowable deduction from gross income under the aforesaid taxing statutes of 1909 and 1913, respectively.

The "released reserve" arose by reason of the payments of policy losses, which were deducted from gross income in the tax return for 1913.

Decreases in liabilities for 1910 and 1911 were deducted from increases in liabilities in making up the net additions in the tax returns for those years, because the officials of the company believed the Commissioner of Internal Revenue required them to do so and because they considered it equitable.

Opinion.

Booth, *Judge,* delivered the opinion of the court.

The petition in this case alleges certain facts upon which the claimant company rest a contention for the refund of certain excise and income taxes said to have been illegally collected under section 38 of the act of August 5, 1909, 36 Stat. L., 112, and section 2, division G, of the act of October 3, 1913, 38 Stat. L., 172. The amount claimed is $16,306.16.

Section 38 of the act of August 5, 1909, provides as follows:

"Sec. 38. That every corporation, joint-stock company, or association, organized for profit and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing of business by such corporation, joint-stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint-stock company or association, or insurance companies, subject to the tax hereby imposed."

Division G of the act of October 3, 1913, provides as follows:

"(*c*) The tax herein imposed shall be computed upon its entire net income accrued within each preceding calendar year ending December thirty-first: Provided, however, That for the year end-
34 ing December thirty-one, nineteen hundred and thirteen, said
tax shall be imposed upon its entire net income accrued within that portion of said year from March first to December thirty-first, both dates inclusive, to be ascertained by taking five-sixths of its entire net income for said calendar year."

In pursuance of the foregoing enactments the claimant, a casualty insurance company, organized and incorporated under the laws of the State of Maryland, made its return to the Commissioner of Internal Revenue for the years 1909 to 1912, inclusive. The comissioner declined to accede in all respects to the returns as made, insisting upon various amendments of the same, which, as he claimed, more clearly reflected the net income of the corporation for taxable purposes. The claimant company paid the additional taxes assessed under the amended returns under protest, and herein seeks to establish a misconstruction of the law under which the same were assessed and collected.

Without discussing the details of the various returns as they appear in the findings, the case may be disposed of as to the legal propositions involved by taking them up in the order adopted by the parties in the case in their briefs.

The original returns made by the company for each year covered by the petition in this case, except for the year 1913, was made upon a basis of cash received as distinguished from the total amount of business done on paper, i. e., a written basis. The commissioner amended each return so made to comply with a return made by the company to the State insurance department of the State of Maryland, wherein it listed its total business transactions, both cash received in premiums and premiums due on insurance written but not received at the home office of the company during the calendar year. The claimant company now contends that its original returns made upon a cash basis conform to the excise law, and upon them alone was the tax to be assessed and collected.

The language of the taxing act clearly imports an intent to tax the entire net income, with certain deductions, received by the company from all sources during the calendar year. While the tax itself is an excise tax, imposed upon the privilege of doing business in a corporate capacity, the amount of the tax is measured by the net income received from all sources during the time stated. Flint v. Stone Tracy Co., 220 U. S., 108.

The word "income," as used in revenue legislation, has a settled legal meaning. The courts have uniformly construed it to include only the receipt of actual cash as opposed to contemplated revenue due but unpaid, unless a contrary purpose is manifest from the language of the statute. What is taxed by the terms of the foregoing

statutes is "net income received," not income accruing or accrued which has not been received and portions of which may never be received. While the phrases "income received" and "income accrued" are frequently used in the same statute, the courts have not departed, unless it expressly appears otherwise, from a construction of the law in accord with an intention to reach the actual and not the potential income of the corporation. In the income-taxing act of 1913, 38 Stat. L., 172, the two preceding phrases are employed; in fact, the act of 1913, in speaking of income as applied to
35 insurance companies and domestic corporations, uses the above phrases as follows: "Income arising or accruing," "income received," and "income accrued." Doubtless it was the intention of Congress in legislation of this character to employ terms of sufficient comprehension to reach the actual income of the corporation by foreclosing any possible avenue of escape, but it can hardly be said that in so doing an intention prevailed to tax that which did not actually exist, except on paper, as income accrued during the taxing period. One can not be said to receive an income of defined proportions until he balances receipts and deductions at the end of a stated period and ascertains not what is due but what has been actually received. The assets and liabilities of a corporation may be measured by a different rule of accounting, but income as defined by the courts means, as said in United States v. Schillinger, 14 Blatchf., 71, "In the absence of any special law to the contrary, income must be taken to mean money, and not the expectation of receiving it or the right to receive it at a future time."

In Mutual Benefit Life Ins. Co. v. Herold, 198 Fed., 199, Judge Cross, in the United States District Court for New Jersey, had before him an excise case in which this identical question was directly involved. After reviewing at length the general intendment of taxing statutes, a part of his discussion with reference to this question is in the following language:

"That law provides that the tax is to be—

"'One per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amount received by it as dividends upon stock of other corporations, joint-stock companies or associations, or insurance companies, subject to the tax hereby imposed.'

"This language seems clearly to indicate that the net income, which is the measure of taxation, means what has actually been received, and not that which, although due, has not been received, but its payment for some reason deferred or postponed. Furthermore, an examination of the act shows that the net income is to be ascertained by deducting from the gross income:

"(1) 'All the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties.'

"(2) 'All losses actually sustained within the year,' etc.; 'also the sums other than dividends paid within the year on policy and annuity contracts, and the net addition, if any, required by law to be made within the year to reserve funds.'

"(3) 'Interest actually paid within the year on its bonded and other indebtedness,' etc., 'and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposit.'

"(4) 'Also all sums paid by it within the year for taxes,' etc.

"(5) 'All amounts received by it within the year as dividends upon stock of other corporations, joint-stock companies or associations, or insurance companies, subject to the tax hereby imposed.'

"Since, then, the language of the act is explicit in permitting only such deductions from the gross income as were actually paid during the current year, it would be strange, indeed, if on the opposite side of the account the company were charged with
36 what it had not received during the current year. No reason
appears or has been suggested for so radical and unwarranted a departure. Furthermore, the word 'income' means, as already shown, that which has come in, and not that which might have come in, but did not. If expenditures means what has been paid out, or outgoes, then income means what has come in, or receipts. The matter, however, does not rest entirely upon arbitrary statement, since there are a number of cases which throw light upon the question."

It is true, as observed by the defendants, that the above case concerned a life and not a casualty insurance company, and that the decision rested to some extent upon a belief that the State insurance department required an annual report upon a cash basis. Nevertheless the distinction is not of such importance as to destroy the reasoning. The ascertainment of the taxable income is obviously not affected by the difference in the character of the business conducted, nor by what is left to regulation by the laws of the different States. The law now under consideration imposes a tax by express provisions and unless "income received" can be construed to include prospective gains, sometimes secured, sometimes unsecured, it must be limited, as its terms imply, to what is certain, easily known, and easily computed.

The Herold case, supra, came before the Circuit Court of Appeals, 201 Fed., 918. The question referred to above was not discussed by the appellate court; the opinion considers but a single question other than the above. The decision of the district court was affirmed, however, the parties seemingly being content with the decision with respect to this particular issue, as it was not raised upon appeal. The rule was followed in Insurance Company of North America v. McCoach, 218 Fed., 905; Connecticut Mutual Life Ins. Co. v. Eaton, 218 Fed., 188 and 223. The defendants have cited no decisions to the contrary and, doubtless, it can not be done.

The record reveals a state of facts apropos of this particular contention which conclusively show that the claimant company in its original return did not report its actual cash income for the calendar year 1909. A system of accounting adopted by the company allowed a period of two months to local agencies in which to report their cash premium receipts to the home office. Such a system, in view of the rules and regulations of the Commissioner of Internal Revenue, does not "clearly reflect" the company's income, for it is admitted that some and perhaps the greater portion of premiums listed in the original return as due but unpaid have been paid to the company's agents. A payment to the agent is payment to the principal, and the company under the rules of the commissioner has until March 1 following the close of the calendar year to make its return. While under the provisions of the act of September 8, 1916, 39 Stat. L., 771, a corporation's system of bookkeeping is not to be disturbed, still it is apparent from the language of the section so providing that the system adopted must be such as to "clearly reflect its income." The company in the present case is obligated under the law to report in full the total sums received in cash, both the amounts received at the home office and those paid to its lawful agencies during the calendar year. Any other course, no matter how convenient would fail in firmly establishing the dividing line between sums due and unpaid and actual income received during the year. 37 It is somewhat inconsistent to claim a right under the cash basis of returns when it is apparent from the return itself that it embodies both the cash and written bases. The two systems can not overlap. The accounting must distinctly disclose the gross income from all sources.

The commissioner in his final assessment collected the excise tax for 1909 on a basis of $643,162.08 premiums written but not reported to the company paid in 1909. In reaching this conclusion he excepted as part of the cash income of the company the sum of $584,164.18 premiums written in 1908 but paid to the company in 1909, as found in the company's original return, imposing by his amended return made to the company an additional tax based upon the difference between the two sums mentioned above, i. e., $58,997.90. In this respect we think he was in error. The return of the company should have disclosed all cash payments of premiums made during the calendar year.

The next contention is more perplexing and necessarily involves the application by the commissioner of a strict rule of construction of the taxing law. A deduction is allowed insurance companies of "the net addition, if any, required by law to be made within the year to reserve funds." This language standing alone is apparently free from ambiguity. The intent of the law is not difficult to perceive. Its practical administration, however, becomes difficult because of a diversity of opinion as to just what sums are to be included as coming under the law within the reserve funds. Claimant company contends that under the requirement of the laws of the various States it is required to maintain a separate reserve fund of sufficient amount to protect the policyholder, creditor, and claimant; in other words, the reserve fund must be co-extensive with the company's liabilities. That the company did not always entertain this conception of its rights is manifest from its returns, for during the early

years of the law's operation it did not include items it subsequently claimed as coming within this category. The department in administering the law adopted as a uniform basis for reserve deduction "the reserve of the State in which the reserve requirements are the greatest." The reserve required by the various States of the Union is, of course, a statutory provision setting forth the conditions upon which foreign corporations and insurance companies may transact business within the State. These statutes, like laws of similar character, provide a separate department with a commissioner in charge to administer the law. The commissioner in so doing promulgates rules and regulations which in his view meet the requirements of the statute, but vary in the different States as to the items of amounts which go to make up the reserve funds. Legal reserve funds are those sums required by State laws to be maintained by insurance companies to secure its liabilities upon policies written. They are accumulated out of the income of the company and are in reality simply its invested assets, approved securities sufficient in amount to meet the liabilities of the company. An example is found in the unearned premium reserve; the amount required under this item does not cover the full liability of the company upon insurance written up to July 1. It simply requires a reservation of a sufficient sum to pay the premiums of reinsurance upon the enforceable poli-
cies then extant in the event the company should go out of
38 business or to return the unearned portion of the premiums
paid in the event of bankruptcy, cancellation of policy, etc.
This reserve, as we understand the situation, is not intended to cover the company's liability with respect to the insurance written, but is a fund providing against loss in case of the happening of a certain contingency. While of course it naturally affects the solvency of the company, for if for any reason it is incapable of maintaining the same its business may be foreclosed, yet it is not in its essential characteristics a provision against insolvency. It in nowise secures other creditors or claimants of the company. The computation of the amount is ascertained upon a hypothetical basis, and the rules governing it are arbitrary. The laws of the States, probably without exception, require the maintenance of this reserve and insurance companies for years have recognized the wisdom of its existence.

Loss and unpaid liability claims afford an exact basis for computation, and the reserves maintained cover the liability therefor. The State statutes most generally require the maintenance of a reserve to cover each class of this particular kind of insurance, but it is difficult to perceive upon what theory, under the above provision of the taxing law, a corporation or insurance company can expand this privileged deduction to include all the liabilities of the same. Unpaid taxes, unpaid salaries, brokerage, and agents' commissions are current expenses; they are essentially items of expense in the daily, monthly, and yearly conduct of the company's business; the amount and date of payment is fixed and determined; they depend for liquidation solely upon the company's earning capacity as the business progresses. This is the only basis for a contingency with respect thereto, and no State law has been pointed out which requires the maintenance of reservations to secure these payments, especially of stated personal stipends to the agents of the company. Taxes, as a rule, are payable annually. A permanent reserve for their payment is not necessary or required by law, and they are not properly included in the net additions required by law to reserve funds. The statute specifically limits the deduction to sums required by law, not such reservations as business prudence may suggest. The State statutes prescribe the necessary reservations, and the commissioner was within the law in holding fast thereto.

It is not to be supposed that Congress in providing this specific exemption intended a wider latitude with reference thereto than the express words of the act clearly designate. The limitation is confined to net additions to reserve funds required by law, and the express provisions of statutory law fix the determining basis. State insurance companies can only act within the provisions of the State statute; so that in any event a firm basis is easily available for the application of the exemption provided in the Federal taxing acts.

It is to be noted in this connection that the commissioner observes any change in the status of State laws and amends his rulings with respect to additions to reserve funds in accord with the same.

The claimant company in its return for 1909 included in its deductions for net increase to reserve funds required by law but three items, viz, unearned premiums, loss claims, and unpaid liability claims. In 1910 it added to these items a claimed deduction for unpaid taxes and unpaid salaries. In 1911 it added brokerage, etc., and reinsurance due other companies, and in 1912 claimed a total amount of $670,791.89, made up by including a claim for
39 each item specified above. The commissioner's rulings in his amended returns as to this item we believe to be correct.

The next contention is directly converse of the preceding one. Net additions to reserve funds are exempt, and if there are no net additions but a decrease in reserve funds, commonly called released reserve, is this amount taxable? In 1912 the claimant company, in its return to the Maryland State Department of Insurance, listed its special reserve for unpaid liability losses as amounting to $1,194,235. In the following year, with reference to this special item, the company stated the amount of $841,983, a decrease of $352,252. The increase in unearned premium reserve for 1913, as stated in claimant's original return, amounted to $81,784.67, for which amount the company was entitled to an exemption, leaving a total difference of $270,467.33, less sum required as reserve fund for 1913 over 1912; i. e., the company's reserve funds required by law were $270,467.33 less in 1913 than in 1912, and hence it became available for other business purposes.

The commissioner has consistently included the total sums of released reserves within the gross income of insurance companies and subject the same to the excise tax. The claimant company since 1909 have accepted the ruling and made their returns accordingly. The issue is for the first time presented in the present suit.

A reserve fund is necessarily a certain portion of the company's income; it fluctuates as its volume of business increases or decreases, and it is difficult to trace its creation to the company's income in any specific year. Nevertheless, it is nothing more or less than the setting aside of certain portions of the company's assets accumulated during the course of business from its income, in order to secure the payment of certain liabilities incurred. The company receives a premium of $100; $50 of this sum must be reserved under the law to meet the contingency of reinsurance—unearned premium. While the $50 is exempt, it is none the less income. It escapes taxation the year it is exempt, but when the obligations of the policy have been discharged this amount is released from reserve. It becomes in theory and in fact an available asset, free from restrictions, to be used by the company as it may see fit. The Federal taxing act doubtless exempted net additions to reserve fund upon the theory of their actual reservation, the inability of the company to avail itself of these sums in the transaction of its current business affairs, aside from its specific liabilities upon insurance written, and while the law does not in express terms use the phrase "released reserves," we believe the amounts realized are taxable as coming within the general term "gross income" for the calendar year from all sources. As was said by Mr. Justice Day in Flint v. Stone Tracy Co., supra:

"This tax, it is expressly stated, is to be equivalent to one per centum of the entire net income over and above $5,000 received from all sources during the year; this is the measure of the tax explicitly adopted by the statute. The income is not limited to such as is received from property used in the business, strictly speaking, but is expressly declared to be upon the entire net income above $5,000 from all sources, excluding the amounts received as dividends on stock in other corporations, joint stock companies or associations, or insurance companies also subject to the tax. In other words, the tax is imposed upon the doing of business of the character described,
40 and the measure of the tax is to be the income, with the
deduction stated, received not only from property used in business but from every source. This view of the measure of the tax is strengthened when we note that as to organizations under the laws of foreign countries the amount of net income over and above $5,000 includes that received from business transacted and capital invested in the United States, the Territories, Alaska, and the District of Columbia.

"It is further strengthened when the subsequent sections are considered as to deductions in ascertaining net income and requiring returns from those subject to the act. Under the second paragraph the net income is to be ascertained by certain deductions from the gross amount of income received within the year "from all sources" and the return to be made to the collector of internal revenue under the third section is required to show the gross amount of the income received during the year "from all sources." The evident purpose is to secure a return of the entire income, with certain allowances and deductions which do not suggest a restriction to income derived from property actively engaged in the business. This interpretation of the act, as resting upon the doing of business, is sustained by the reasoning in Spreckels Sugar Refining Co. v. McClain, 192 U. S., 397, in which a special tax measured by the gross receipts of the business of refining oil and sugar was sustained as an excise in respect to the carrying on or doing of such business."

The sums released from reserve funds can not be said to be exempt as reserve funds, for they no longer retain that character. They have always been part of the gross income and accounted for as such during the years of their accumulation. When released, therefore, they must of necessity have some particular status in the business transactions of the company, and while they do not augment the gross income for the particular year in which they are released, they are in their very essence income and the statute expressly says "income from all sources." If this especial exemption had not been provided all the funds reserved would have been accounted for in the company's returns as income received. They are income received but exempt when required to be reserved. When the requirement of the law has been subserved they then become a part of the gross income for the year in which they are released. This has been the construction given since the passage of the taxing act.

It is apparent from what has been said that the case must be remanded to the general docket for a restatement of amounts due in accord with this opinion. It ought not to be difficult to agree upon a statement of amount. The case in this respect is quite involved, but the parties themselves are in position to ascertain this fact with much more accuracy than the court.

It is ordered that the case be remanded to the general docket for a restatement of amounts due. Thirty days from this date will be allowed for this purpose, after which time the case will be placed upon the trial calendar and finally disposed of.

41

V. *History of Proceedings.*

On March 14, 1917 the claimant filed a motion to amend the Court's findings.

On the same day the motion was argued and submitted by Mr. A. R. Serven, for the claimant, and Mr. G. M. Anderson, for the defendants.

VI. *Opinion of the Court, by Booth, J., on Claimant's Motion to Amended Findings.*

Filed April 2, 1917.

Booth, *Judge,* delivered the opinion of the court.

The above case was submitted to the court upon agreed findings of fact. The statement of fact subscribed to by both the claimant company and the defendants covers thirty-four pages of the record and embraces a volume of figures, intricate, involved, and difficult to correctly understand except by those especially skilled in the in-

surance business. Each item contained in the complete return made by the company to the Commissioner of Internal Revenue was supposed to be a correct duplication of said return, the court accepting the same as true upon the express stipulation of the parties. The record upon its face radiated an amicability between the contending parties so pronounced that we were at one time almost convinced that the case was a moot one. The judgment of the court as expressed in the opinion did not in all respects conclude the propositions advanced by the parties and left the court in a position where, from the agreed findings, it could not enter a final judgment. In order to facilitate the disposition of the case, and in view of the expressed harmony between the parties as to their differences, we confidently believed that the proper course to pursue was to remand the case for a statement of amounts due under the opinion of the court. In response to this order of remand we are met with a motion to amend the findings and wide divergence of opinion respecting the sums due. Taking up the motion to amend first, we find the claimant company now contends that certain amounts were omitted in Findings I, II, and III, not through any carelessness of claimant's counsel, but apparently caused by the neglect or stupidity of the printer employed to do its printing. It is not alleged with absolute certainty that this is the true situation as to all the items omitted, but is asserted as an impression that the figures now asked for were inserted in the printer's proof returned by claimant's attorney to the printer, and by the latter omitted from the final impression. The motion to amend is not supported by an affidavit and does not otherwise comply with the rules. Inasmuch as the omission of some of the
42 figures now claimed evoked comment by the court in its opinion, being treated as accurate and certain, we do not feel disposed at present to grant the motion.

The amendment requested disturbs a stipulation solemnly made between the representative of the claimant company and the defendants, and while it may not disturb in any important particular the judgment of the court as expressed in the written opinion, it is incompatible with the stipulations of fact upon which the court considered the case to permit the findings to be varied at this time. The facts now asked to be put into the findings were directly before the parties at the time the stipulation was entered into, and if deemed important they should have been included then. It is too late after the court has decided the case upon the record as submitted herein to raise a new issue or reinforce by the introduction of new facts a contention made upon the facts as agreed to by the parties. Litigation under these circumstances would never be concluded and the court remain always under a trembling uncertainty as to the finality of its judgments.

The amendment asked as to Finding IV embraces an inadvertence not easily excused. The most consequential issue presented by the record involved the question of making amended returns to the commissioner upon the written or cash basis in so far as premiums for insurance were concerned. The claimant company in an elaborate and able brief contended vigorously for a return predicated upon the amount of premiums received by the company in cash during the calendar year. The defendants as vigorously contested the issue, and in so doing developed, by oral testimony as well as by repeated assertions in the written brief, that in the event of the court sustaining the claimant's contention the record did not disclose the full amount of cash premiums received by the company during the calendar year. This defense was predicated upon the fact that the claimant company under agreement with its local agencies did not require the agents to report the cash premiums collected by them to the home office for 60 days after their collection.

Finding IX of the agreed findings disclosed the situation and contained the facts upon which the court acted. It is obvious that under this system of accounting the cash received by local agents for the last two months of the calendar year was not reported by the company in its yearly returns to the Commissioner. In view of this situation it is quite illogical to now assert that because the court held that all the cash received, either by the company at its home office or in the hands of its agents, during each of the 12 months of the calendar year is distinctly erroneous because the court at the time of the decision did not have before it a copy of the written contracts the company made with its local agencies. It is not always difficult to amend a record after the court has delivered its opinion, and it not infrequently occurs that the holding of the court suggests amendments to findings, when in the interest of justice and the expedition of cases it ought to have been brought in in the first instance. Notwithstanding what has been said we would insert the proffered contract if in our view of the case it was material. The evidence is merely cumulative and it in nowise
simplifies the issue or contributes toward its proper solution.
43 The facts as agreed to in finding IX state the situation, and
the court is of the opinion that a private contract between this claimant company and one of its agents can not be availed of to change the rule as laid down by the Congress in the taxing statutes. The whole controversy is covered in the opinion of the court, and the facts are sufficiently stated to fully meet the issues.

The case will be remanded to the general docket for one purpose and one only: To show on or before the expiration of the time mentioned in this order all sums of money collected as premiums upon insurance at either the home office of the company or in the hands of its agents for the full 12 months of each of the calendar years 1909, 1910, 1911, 1912, and 1913. This proof must disclose the total receipts in cash for premiums upon insurance for each of the above years in accord with the opinion of the court. Ninety days from April 2, 1917, will be allowed for this purpose, after which date the final judgment in the case will be awarded without further argument or motions herein. It is so ordered.

44 VII. *History of Further Proceedings.*

On September 28, 1917 the claimant filed a motion for leave to file a motion to amend findings. This motion was overruled by the Court December 3, 1917.

VIII. *Per Curiam Opinion.*

Filed December 3, 1917.

PER CURIAM:

The court announced its opinion in this case on February 12, 1917. The order then made remanded the case to the general docket for a restatement of amounts due under the agreed findings of fact so that a correct judgment might be awarded. A wide difference of opinion developed between the contending parties and in order to simplify the issue the court on April 2, 1917, announced its second opinion, again remanding the case to the general docket for specific proof in accord with what we deemed a perfectly plain and specific order. Ample time was allowed to comply with the order and the parties fully protected in every respect. The order of April 2, 1917, has not been complied with. The court can not and will not enter money judgments against the United States in a case like this upon estimates. The figures were available and exactness possible. The claimant company having been given ample opportunity to furnish this testimony, and having failed to do so, the court can do no less than dismiss its petition. The petition is dismissed. It is so ordered.

45 IX. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 3rd day of December, A. D., 1917, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants and do order adjudge, and decree that the Maryland Casualty Company, as aforesaid, shall not have and recover any sum in this action of and from the defendants, the United States; and, that the claimant's petition be and the same hereby is dismissed; and, it is further ordered, adjudged, and decreed that the defendants, the United States, shall have and recover of and from the Maryland Casualty Company, as aforesaid, the sum of Three hundred and twenty-four dollars and fifty-one cents ($324.51), the cost of printing the record in said cause in this court, to be collected by the Clerk, as provided by law.

BY THE COURT.

46 X. *Proceedings After Entry of Final Judgment.*

On January 30, 1918 the claimant filed a motion for a new trial. This motion was overruled by the Court February 25, 1918.

XI. *Claimant's Application for, and Allowance of, Appeal to the Supreme Court.*

Comes now the claimant, by its attorneys, in the above entitled cause, and prays this Honorable Court that an appeal be granted therein to the Supreme Court of the United States.

MARYLAND CASUALTY COMPANY,
By SERVEN & JOYCE,
Its Attorneys.

Filed February 26, 1918.
Ordered: That the above appeal be allowed as prayed for.
February 28, 1918.

BY THE COURT.

47 In the Court of Claims.

No. 33191.

MARYLAND CASUALTY COMPANY, a Corporation,

vs.

THE UNITED STATES.

I, Sam'l. A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and opinion of the court; of the opinion of the court on claimant's motion to amend findings; of the per curiam opinion; of the judgment of the court; of the claimant's application for, and allowance of, appeal to the Supreme Court.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City this 18 day of March, A. D., 1918.

[Seal of Court of Claims.]

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,407. Court of Claims. Term No. 940. Maryland Casualty Company, appellant, vs. The United States. Filed March 26th, 1918. File No. 26,407.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 73.

MARYLAND CASUALTY COMPANY, Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

STATEMENT OF FACTS.

This case involves the construction and application of sec. 38 of the act of August 5, 1909, 36 Stat. L., 112, and sec. 2, division G, of the act of October 3, 1913, 38 Stat. L., 172, as applied to insurance companies. The above-mentioned laws are set forth in full in an appendix to this brief.

The Maryland Casualty Company, the appellant, is a domestic corporation transacting an insurance business in all of the States and Territories of the United States, with its office at Baltimore, Md., and was so transacting its business in the years 1908 to 1913 (Rec., p. 9). Under the act of 1909 it was required to pay an excise tax "equivalent to one per cent upon the entire net income over and above $5,000 received by it from all sources during such year." The method of determining the net income is specifically set forth in the statute, subdivision 2, in part as follows: "Such net income shall be ascertained by deducting from the gross amount of income, * * * received within the year from all sources. (I.) All the ordinary and necessary expenses actually paid within the year out of income * * *. (II.) All losses actually sustained within the year and not compensated by insurance or otherwise, * * * and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds. (III.) Interest actually paid within the year * * *. (IV.) All sums paid within the year for taxes * * *. (V.) All amounts received by it within the year as dividends upon stock of other corporations * * * subject to the tax hereby imposed * * *."

A specific deduction of $5,000 from income is provided by subdivision "third," and each corporation coming within the operation of the law is required to file a report setting forth under oath, among other things: "(III.) The gross amount of income * * * received during such year from all sources * * *. (IV.) The total amount of all ordinary and necessary expenses actually paid * * * within the year. (V.) The total amount of all losses actually sustained during the year and not compensated by insurance or otherwise, * * * and in the case of insurance companies the sums other than dividends paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds. (VI.) The amount of interest actually paid within the year * * *, stating separately all interest paid by it within the year on deposit * * *. (VII.) The amount paid by it within the year for taxes * * *. (VIII.) The net income * * * after making the deductions in this section authorized."

In accordance with said act, appellant duly filed its report for 1909 and paid an excise tax of $2,823.20 (Rec., p. 11). Only certain of the items of income, disbursements, and deductions are in issue.

The commissioner, within three years from the date of the return, made and filed an amended return for appellant, upon which a tax was assessed. Credit was allowed for the tax already paid and an additional tax of $9,609.55 (Rec., p. 12) was assessed. This was remitted before payment in the sum of $8,771.43 (Oct. 30, 1913), leaving due on the reassessment $838.12, which was paid under protest with interest, amounting in all to $896.79 (Rec., pp. 13 and 26).

August 14, 1914, the appellant filed a claim for refund of the tax paid November 13, 1913. On April 30, 1915, a claim for refund for the 1909 tax was filed with the Commissioner of Internal Revenue, covering all amounts paid by it in excess of amounts legally due (Rec., p. 26). Both claims for refund were rejected by the commissioner. Suit was instituted February 8, 1916.

Appellant in its return computed its income upon the basis of cash received by it during the year. Its principal item of income was the consideration or premiums paid to it for the policies of insurance issued by it. To compute this sum it took the total of all premiums paid or to be paid for policies issued during the year 1909 and added thereto the total of all premiums received by it in 1909 on policies issued in 1908, and subtracted from the sum so obtained the total of all premiums on policies issued in 1909 but not received by it in 1909.

Total premiums due from policies issued in 1909 (Rec., p. 11, line 5)	$3,908,795.75
Total premiums paid in 1909 from policies issued in 1908 (Rec., p. 11, line 4)	584,164.18
Total	4,492,959.93
Less:	
Total premiums outstanding for collection and remittance December 31, 1909 (Rec., p. 11, line 13)	643,162.08
Total sum received from premiums during the year 1909	$3,849,797.85

In the amended return, as finally adjusted by the abatement allowance, made by the commissioner, the premium income of appellant was based upon the total of all premiums paid or to be paid on policies issued in 1909.

Premiums written for 1909 to include December 31, 1909 (Rec., p. 12, line 28)	$3,908,795.75
Amount reported by appellant	3,849,797.85
Amount in issue	$58,997.90

It is contended by appellant that it should be charged in its income only with sums received by it during the tax year. It is contended by appellee that appellant should be charged in its income with all sums accrued from business transacted within the tax year, whether paid to appellant within the tax year or not. This question is presented to the court for its decision.

Appellant in computing its income for the year 1909 included therein cash received by it which had accrued to it in 1908 from policies issued during that year. It is contended in this suit by appellant that this item, amounting to $584,164.18, should not be included in its income for 1909, as such item had been earned by it and had accrued to it prior to the taking effect of the act, and this question is disputed by appellee and is presented to the court for decision. In case the court should hold that sums earned and due prior to the taking effect of the 1909 act, but received during the year 1909, are not to be included in taxable income under the act, then there should be added to the amount above set forth as

Being in issue, namely	$58,997.90
The sum of	584,164.18
Making the amount in issue total	$643,162.08

Appellant's premium income was collected and remitted to it under a contract with its agents, a copy of the material portions of which are as follows:

> "That upon the terms and conditions, and in consideration of the several covenants and agreements to be kept and performed by the agent, hereinafter set forth, the company has this day appointed and does by these presents make, constitute, and appoint said party of the second part general agent of the company for the procuring of business for the company in the following-described territory, that is to say: City of Moline and vicinity, in the State of Illinois." (Motion for remand, p. 20, par. 3).
>
> "The agent shall, and hereby agrees that he will, during the entire term of the agency hereby created, use the utmost diligence and give his best efforts to the procuring of business and writing and issuing policies of insurance on behalf and for the benefit of the company, at the rates and on the terms authorized in the manual or manuals to be furnished him by the company, and to the prompt collection of and remittance for all premiums payable for such insurance." (Motion for remand, p. 24, par. 2.)
>
> "The agent shall, whenever possible, collect on delivery of each policy the premium for the same, but may extend to policyholders of reputed sound financial condition a credit not to exceed thirty days from date of policy." (Motion to remand, p. 24, par. 5.)

> "The agent shall, immediately upon the expiration of the said credit limit to thirty days, cancel such policies as have not been paid for, taking up the same and forwarding them to the home office of the company with his next monthly statement. In advising the policyholder of cancellation he shall state that such action is taken because of nonpayment of premium, and shall simultaneously notify the home office to that effect." (Motion to remand, p. 25, par. 1.)
>
> "The agent shall, and hereby agrees that he will, not later than the fifth of each calendar month during the term of the agency hereby created, render to the company a true and complete statement, in form such as the company may require, showing the number, description of, amount insured by, and the premium on each policy written or issued by or by the authority of the agent during the preceding calendar month; and he further agrees that he will on the fifth day of each calendar month pay or remit to the company in cash or its equivalent the balance due the company as shown by the last preceding monthly statement rendered to the company; and he also agrees that, in addition to the *said balance,* he will include in each remittance to the company *all moneys collected by him* for account of *additional premiums* on *excess pay rolls,* rendering to the company a detailed statement of said additional premiums with each remittance." (Motion to remand, p. 21, par. 2.)
>
> "It is expressly understood and agreed that the agent is and shall be directly accountable to, and shall and will on demand therefor, at all times account to and with the company for all moneys, premiums, policies, documents, or other property belonging to the company, or for or in respect of which it may from time to time be entitled to an account under the provisions of this contract * * *." (Motion to remand, p. 27, par. 2.)

Under this contract policies written in November, 1909, were reported to the company December 5, 1909, but as a thirty-day credit was allowed to the persons insured within which to pay the premium, the agents did not remit the November premium until January 5, 1910. The appellees insist that appellant should be charged in its income with premiums collected by its agents, but not remitted to it. Appellant insists that it is not chargeable with the receipt of premiums collected by its agents until such premiums are remitted to it. The lower court held that appellant should be charged in its gross income with premiums collected by its agents in 1909 and unremitted to it. This question is presented to this court for decision.

No evidence was introduced showing the premiums collected by agents and unremitted to appellant in 1909.

The other items in the computation of the gross income of appellant are not in issue.

In computing the deductions specified in the law to be taken from gross income to determine net income, appellant included in its 1909 return, under the deduction allowed for the net addition required by law to be made within the year to reserve funds, the following items:

Net addition to unearned premium reserve	$205,447.85
Net addition to liability claims reserve	238,734.32
Net addition to loss claims reserve	14,510.99
Total	$458,693.16

(Rec., p. 10, item (*d*); p. 11, lines 22, 23, 24 and 25.)

In the amended return, as finally adjusted by the abatement allowance made by the commissioner, appellant's deduction for net addition required by law to be made within the year to reserve funds included the following items:

Net addition to unearned premium reserve	$205,447.85
Net addition to liability loss reserve	238,734.32
Total	$444,182.17

(Rec., p. 11, item (*d*), p. 13, lines 3, 7, 8 and 9.)

The item disallowed being net addition to loss claim reserve (Rec., p. 13, line 21)	14,510.99
Total	$458,693.16

At the trial, under its petition, appellant showed the following increases in reserves required by law, theretofore omitted in its 1909 deduction:

Increase in reserve for brokerage, etc.	$22,048.09
Increase in reserve for taxes	16,490.35
(Motion to amend findings, p. 15-16)	$38,538.44
To which should be added:	
Net addition to loss claims reserve	14,510.99
The total item in issue being	$53,049.43

Appellant transacted business (1908-1913) in Massachusetts, New York, Pennsylvania, and Wisconsin, and in these States, before it was allowed to do business therein, it was required to have assets as reserve funds equal to all of its outstanding liabilities (Rec., p. 27, Fnding 12).

Insurance premiums being payable in advance, insurance companies are required to maintain sufficient liquid assets to reinsure such risks in a solvent insurance company, the assets so maintained or reserved constituting the unearned premium reserve. The methods of computing the unearned premium reserve and the reserve for losses arising on employers' liability policies were in 1909 specifically set forth in the State laws of New York, and such reserves are recognized by the appellees as being required by law.

The several sections of the laws under which the superintendent of insurance of New York acted in requiring appellant to maintain reserves for all liabilities are fully set forth in the appendix and epitomized.

Chapter 33 of the Consolidated Laws of New York, for the year 1909.

Section (2) provides for a superintendent of insurance.

Section (9) provides that no foreign (organized outside of the State of New York) insurance company shall transact business in New York without a certificate from the superintendent. The superintendent may refuse to issue any such certificate, if, in his judgment, such refusal will best promote the interest of the people of the State.

Section (25) gives the superintendent supervision over foreign insurance corporations and makes them subject to the penalties under the laws of the State or the regulation of the insurance department.

Section (32) provides that the certificate of authority to do business to foreign companies shall expire yearly. "If the superintendent is satisfied that the capital, securities and investments remain secure and that it may be safely intrusted with a continuance of its authority to do business, he shall grant a renewal of such certificate of authority."

Section (86). * * * "In estimating the condition of any casualty insurance corporation under the provisions of this chapter, the superintendent shall allow as assets only such * * * as are authorized by the laws of this State, and shall charge as liabilities, in addition to the capital stock, all outstanding indebtedness of the corporation, and the premium reserve on policies in force, * * *. There shall also be charged as a liability to each company which undertakes or writes insurance under subdivision three of section seventy of this act (employers' liability insurance) a further reserve, as hereinafter provided * * *."

Sec. (21) provides that every insurance corporation whose assets and credits are not sufficient to reinsure its outstanding risks shall be deemed insolvent.

Appellant maintains that under the above sections, the superintendent was clothed with authority by the legislature of New York to make such requirements of insurance companies to which he issued licenses, as to the reserves to be maintained by them, as he deemed necessary, and that such requirements were legal requirements and such reserves were required by law and the net addition to them, if any, was a proper deduction. The appellees deny this contention and the question is presented for decision by the court.

The commissioner of insurance of the State of Wisconsin was, up to and including the year 1911, elected by the people of the State of Wisconsin.

The several sections of the laws of the State of Wisconsin under which the commissioner of insurance acted in requiring the appellant to maintain reserves for all liabilities are fully set forth in the appendix and epitomized are as follows:

Wisconsin Statutes 1898:

Section 1966-32 provides for the filing by a casualty or suretyship corporation with the commissioner of insurance an application showing:

1. Its principal place of business and the kinds of business to be transacted.

2. That the corporation has a capital stock as required by statute and that it maintains legal deposits in the State of its incorporation.

3. A copy of its charter and by-laws.

4. A statement of its financial condition and a provision that the insurance company must comply with the laws of the State of Wisconsin and be subject to the penalties provided by the statutes of the State.

Section 1966-47 provides that the commissioner, in computing the reserve liability of casualty companies, "shall make such calculations as, in his judgment, are equitable and just to both the policyholders and the company; provided, that such liability so determined shall not be less than fifty per cent of the premiums written in the company's policies."

Section 1972*a* provides that the commissioner of insurance shall bring notice of the violation of the provisions of the Wisconsin statutes to the notice of any company which is violating the same, and if such company be incorporated under the laws of any other State he shall, in case of violation, revoke its authority to do business in Wisconsin.

Section 1968 provides for examinations of insurance companies by the commissioner, and if upon such examination the commissioner finds the condition of any foreign company examined unsound, then he shall revoke the certificate of such company to do business in Wisconsin. It further provides that "the commissioner shall, in like manner and upon like conditions, examine insurance corporations applying for admission to transact business in this State, and if the affairs or condition of any such corporation do not fully meet the requirements of law he shall withhold his certificate."

Wisconsin statutes supplement, vol. 3, 1899-1906, section 1971, provides for the filing of annual statements.

Appellant maintains that under the above sections the commissioner was clothed with authority by the legislature of Wisconsin to make such requirements of insurance companies to which he issued licenses, as to the reserves to be maintained by them, as he deemed necessary, and that such requirements were legal requirements, and such reserves were required by law, and the net addition to them, if any, was a proper deduction. The appellees deny this contention, and the question is presented for decision by the court.

Appellant regularly filed its return for the year 1910, upon which a tax was assessed of $2,212.11, and paid June 27, 1911 (Rec., p. 14). The commissioner reassessed appellant's 1910 tax, and August 11, 1914, appellant paid under protest an additional tax of $1,191.64 (Rec., p. 16).

Appellant filed, August 14, 1914, a claim for refund of the additional tax paid for 1910, and on April 30, 1915, a claim for refund of all taxes paid for 1910 (Rec., p. 26).

The same conflict arises as to premium income in the 1910 tax as arose in the 1909 tax.

Appellant's Premium Income as Reported by It (Cash Basis).

Total premiums due from policies issued in 1910 (Rec., p. 14, line 26)	$4,488,755.68
Total premiums paid in 1910 from policies issued in 1909 (Rec., p. 14, line 24)	643,162.08
Total	$5,131,917.76
Less:	
Total premiums outstanding for collection and remittance December 31, 1910 (Rec., p. 14, line 33)	768,917.62
Total sum received from premiums during 1910	$4,363,000.14

Appellant's premium income, as set up by the commissioner, upon reassessment (Rec., p. 15, line 48)	4,488,755.68
Amount reported by appellant	4,363,000.14
Amount in issue	$125,755.54

No other item of gross income is in issue, and the same question arises as to payment to agent as is raised in the 1909 assessment.

The same question is at issue in the tax of 1910, as in 1909, as to the deduction of the net addition, if any, required by law to be made within the year to reserve funds.

Appellant, in its original return, reported its net addition to reserve funds as follows (Rec., p. 14, lines 39-46):

Unearned premiums	$239,560.21
Special reserve for unpaid liability losses	94,010.81
Loss claims	52,240.81
Unpaid taxes	9,359.39
Unpaid salaries	15,295.14
	$410,466.36

Less:

Decrease in reinsurance due other companies	906.95
Balance	$409,559.41

In the amended return prepared by the commissioner, the deduction allowed as net addition to reserve fund was (Rec., p. 16, lines 4-6):

Unearned premiums	$239,560.21	
Unpaid liability losses	94,010.81	
		333,571.02
Difference		$75,988.39

At the trial, under its petition, the appellant showed the following increases in reserves required by law, theretofore omitted in its 1910 deduction (motion to remand, p. 15 to 17):

Reserve for brokerage, etc.	$42,389.46	
Error in reserve for salaries	551.14	
		42,940.60
Making the total sum in issue		$118,928.99

Appellant regularly filed its return for the year 1911, upon which a tax was assessed of $2,644.45, and paid June 29, 1912 (Rec., p. 18). The commissioner reassessed appellant's 1911 tax, and August 11, 1914, appellant paid under protest an additional tax of $2,613.50 (Rec., pp. 19 and 26). Appellant filed, August 14, 1914, a claim for refund of the additional tax paid for 1911, and on April 30, 1915, filed a claim for refund of all taxes paid for 1911 (Rec., p. 26).

The same conflict arises as to premium income in the 1911 tax as arose in the 1909 and 1910 taxes.

Appellant reported:

Net premiums written in 1911 (Rec., p. 17, line 33)	$5,031,810.03
Premiums written in 1910, paid in 1911 (Rec., p. 17, line 32)	768,917.62
	$5,800,727.65
Less:	
Premiums for collection, unremitted December 31, 1911 (Rec., p. 17, line 39)	892,755.17
Total reported by appellant	$4,907,972.48
Premium income reported by Government (Rec., p. 19, line 1)	$5,031,810.03
Reported by appellant	4,907,972.48
Amount in issue	$123,837.55

The same issue is presented as to what was the net addition, if any, required by law to be made within the year to reserve funds, as was presented for the year 1909.

The appellant reported the following net additions to reserve funds required by law (Rec., p. 17, lines 45-53) in its return:

Unearned premiums	$247,036.16
Loss claims	79,107.82
For unpaid liability losses	4,689.32
Brokerage, etc.	25,746.97
Taxes due or accrued	9,474.86
Reinsurance due other companies	1,697.38
	$367,752.51
Less:	
Decrease in liability for unpaid salaries	7,242.37
	$360,510.14
The commissioner (Rec., p. 18, line 26) allowed as a deduction, the unearned premium reserve and the liability loss reserve amounting to	$251,725.48
Amount in issue	$108,784.66

The State of Pennsylvania, in which appellant did business, provided by act of June 1, 1911 (P. L., 607, section 8): "He shall, in calculating the reserve against unpaid losses of casualty companies, other than losses under liability policies, set down by careful estimate in each case the loss likely to be incurred against every claim presented, or that may be presented, in pursuance of notice from the insured of the occurrence of an event that may result in a loss; and the sum of the items so estimated shall be the total amount of the reserve * * *."

The appellant was in 1911 transacting business in the State of Pennsylvania and came within the operation of the above act and was, by the commissioner of insurance, required to maintain reserves covering all its outstanding liabilities, which included unpaid losses on policies other than employers' liability policies. In case the court should hold that appellant was not required to maintain reserves other than those specifically set up in State statutes, then the question is presented as to whether appellant was required by law to maintain reserves covering losses on policies other than employers' liability policies under the above act. Appellant's total unpaid losses on policies other than employers' liability policies for the year 1911 was $295,031.96 (motion to remand, p. 18), of this sum appellant had included in its net additions to reserve funds required by law $79,107.82. The difference between the total amount of the reserve maintained for these losses and the net addition to such reserve fund for the year 1911 would be $215,924.14. This sum, added to the amount above stated as being in issue, namely, $108,784.66, would make $324,708.80, which would then be the amount in issue.

In 1911 the Wisconsin State legislature passed the following section, which became effective in such year and has a material bearing upon the authority of the commissioner of insurance to issue legal rules and regulations for the conduct of the insurance business in Wisconsin:

> "Sec. 1970*p*. 1.—Notice of the making of any order by the commissioner of insurance may be given by sending to any company * * * a copy of such order by prepaid registered mail * * *."
>
> "2. Within ten days after receiving from the commissioner of insurance written notice of the making of any order authorized by law, and not thereafter, the company * * * affected thereby, by verified petition specifying the reasons therefor, may ask for a rehearing and review thereof before the commissioner, which shall be had within ten days * * *, and the final order shall be made within three days after the close of such hearing * * *."
>
> "3. Any such final order may be reviewed in the circuit court for Dane county * * *."

Appellant regularly filed its return for the year 1912, upon which a tax was assessed of $276.54, and paid June 10, 1913 (Rec., p. 20). The commissioner reassessed such tax, and August 11, 1914, appellant paid under protest an additional tax of $1,990.39 (Rec., p. 22). On August 14, 1914, a claim was filed for the additional taxes collected for 1912, and April 30, 1915, a claim for refund for all taxes paid for 1912 was filed.

The same conflict arises as to premium income in 1912 as in the preceding years.

Appellant's Premium Income as Reported by It (Cash Basis).

Total premiums due from policies issued in 1912 (Rec., p. 20, line 32)............	$5,823,736.06
Total premiums paid in 1912 from policies issued in 1911 (Rec., p. 20, line 31)....	892,755.17
	$6,716,491.23
Less:	
Total premiums outstanding in hands of agents for collection and remittance, December 31, 1912 (Rec., p. 20, line 37)..	1,020,616.32
Total sum received from premiums during 1912..................	$5,695,874.91

Appellant's premium income as set up by the commissioner (Rec., p. 22, line 2)..	$5,823,736.06
Amount reported by appellant..........	5,695,874.91
Amount in issue................	$127,861.15

No other item of gross income is in issue, and the same question arises as to payment to agent as is raised in the 1909 assessment.

The same issue arises in 1912 as to the deduction of the net addition, if any, required by law to be made within the year to reserve funds.

Appellant in its return reported its net addition to reserve funds as follows (Rec., p. 20, lines 41–48):

Unearned premiums	$329,532.89
Loss claims	50,754.24
For unpaid liability losses...............	226,420.00
Unpaid brokerage	34,522.51
Taxes due or accrued....................	13,938.20
Unpaid salaries	6,585.45
Reinsurance due other companies..........	9,038.60
	$670,791.89

The commissioner allowed as a deduction:

Unearned premium reserve..	$329,532.89	
Liability loss reserve.......	226,420.00	
		555,952.89
Amount in issue.................		$114,839.00

In case the court holds that the net addition to reserve funds which appellant is entitled to deduct from its gross income includes only net additions to reserve funds specifically set forth in the State statutes, then the same question arises as to the effect of the act of June 1, 1911 (P. L. 607 of Pennsylvania), as was raised in the preceding year, and the amount in dispute would be the net addition to reserve funds required to cover unpaid losses on claims other than employers' liability claims for the year 1912, amounting to $50,754.24, instead of $114,839.00.

Under the act of October 3, 1913 (section 2, division G), the appellant was required to pay an income tax of one per cent "upon the entire net income arising or accruing from all sources during the preceding calendar year."

The method of ascertaining the net income is provided in division G (*b*) and is in part as follows:

> "Such income shall be ascertained by deducting from the gross amount of the income of such corporation, * * *, received within the year from all sources,—First. All the ordinary and necessary expenses paid within the year * * *. Second. All losses actually sustained within the year and not compensated by insurance or otherwise, * * * and in case of insurance companies, the net addition, if any required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts, * * *. Third. The amount of interest accrued and paid within the year on its indebtedness * * *. Fourth. All sums paid by it within the year for taxes * * *."
>
> "Division G (*c*). The tax herein imposed shall be computed upon its entire net income accrued within each preceding calendar year ending December thirty-first: *Provided, however,* That for the year ending December 31, 1913, said tax shall be imposed upon its entire net income accrued within that portion of said year from March first to December thirty-first,

both dates inclusive, to be ascertained by taking five-sixths of its entire net income for said calendar year * * *."

Appellant was required to furnish a return upon which its tax was based showing—

I. Its capital stock.

II. Its indebtedness.

III. "The gross amount of its income, received during such year from all sources * * *."

IV. "The total amount of all its ordinary and necessary expenses paid out of earnings * * * within the year * * *."

V. "The total amount of all losses actually sustained during the year and not compensated by insurance or otherwise * * *, and in case of insurance companies the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts."

VI. "The amount of interest accrued and paid within the year on its bonded or other indebtedness * * *."

VII. "The amount paid by it within the year for taxes * * *."

VIII. "The net income of such corporation * * * after making the deductions in this subsection authorized * * *."

Under section IV, subdivision S, of the 1913 act, section 38 of the act of August 5, 1909, is repealed, with reservation for the enforcement of the steps already taken thereunder. A new excise tax is enacted for January and February, 1913, based upon net income to be computed as is provided by subdivision G of section 2 of the 1913 act; the tax being computed upon one-sixth of the 1913 income of the taxpayer. The return under the excise tax law for January and February, 1913, and the return under the income tax law for 1913, were made on one return and paid in one sum.

In accordance with said act appellant duly filed its return for 1913, which showed no taxable income for that year. (Rec., pp. 22–24). The commissioner assessed appellant's 1913 tax, and December 7, 1914, appellant paid under protest a tax of $1,657.54 (Rec., p. 25). Appellant filed May 11, 1915, a claim for refund for the tax paid December 7, 1914 (Rec., p. 26).

The same conflict arises as to premium income for the year 1913 as arose in the preceding years.

Appellant's Premium Income for 1913.

Total premiums due from policies issued in 1913 (Rec., p. 23, line 42)	$6,185,482.05
Premiums in course of collection, unremitted December 31, 1912 (Rec., p. 20, line 37)	1,020,616.32
	$7,206,098.37
Total premiums outstanding for collection and remittance December 31, 1913 (motion to remand, p. 18)	1,140,370.29
Total premium income	$6,065,728.08
Appellant's premium income as set up by the commissioner, upon assessment (Rec., p. 25, line 12)	6,185,482.05
Appellant's premium income received by it during the year	6,065,728.08
Amount in issue	$120,753.97

The same question arises as to items earned and accrued before the taking effect of the act of 1913 as arose as to such items under the act of 1909, and in case the court holds that items earned and accrued prior to the taking effect of the act but received within the year 1913 are not to be included in taxable income under the act, then there should be

added to the amount above stated as being in issue, namely	$120,753.97
The sums so earned and accrued in 1912 and received in 1913, namely	1,020,616.32
Making the amount in issue	$1,141,370.29

No other item of gross income is in issue, and the same question arises as to payment to agent as arises in the preceding years.

The wording of the 1913 act, as to the deduction in case of insurance companies of the net addition, if any, required by law to be made within the year to reserve funds, is the same as that of the 1909 act and the same question arises thereunder.

Appellant in its return reported its net additions to reserve funds as follows:

Unearned premiums	$81,784.67
Loss claims	157,800.20
Unpaid brokerage	14,087.64
Taxes due or accrued	6,676.31
Unpaid salaries	3,690.83
Reinsurance due other companies (Rec., p. 23, lines 52–58)	2,120.37
	$266,160.82

The commissioner allowed as a deduction:

Unearned premium reserve (Rec., p. 25, line 23)	81,784.67
Amount in issue	$184,376.15

In case the court holds that the net additions to reserve funds which appellant is entitled to deduct from its gross income includes only net additions to reserve funds specifically set forth in the State statutes, then the same question arises as to the effect of the act of June 1, 1911 (P. L. 607 of Pennsylvania), as was raised in the year 1911, and the amount in dispute would be the net additions to reserve funds required to cover unpaid losses on claims other than employers' liability claims for the year 1913, amounting to $157,800.20, instead of $184,376.15.

Appellant's outstanding losses on employers' liability policies were $352,252.00 less December 31, 1913, than were such outstanding losses December 31, 1912, and accordingly this reserve requirement was less by such sum for 1913 than for 1912. The reserve funds of an insurance company are mobile, increasing and decreasing as the liabilities of the company increase and decrease (Rec., pp. 27, 28, finding XII).

The decrease in the reserve fund for liability loss claims did not cause, directly or indirectly, an increase in income (Rec., p. 29, finding XIV, par. 1). The decrease in the reserve liability did not release funds for other uses. These reserve funds were used to pay liability losses, the payment of which they secured, and thus decreased the outstanding liability losses and reduced the reserve requirement, and thus caused the decrease in the reserve fund.

Appellees contend that if there is a decrease in reserve requirements for any year as compared with the preceding year, then appellant should be charged with the amount of such decrease as an item of additional income.

The reserve required by law to cover unpaid liability losses was $352,252.00 less December 31, 1913, than was required December 31, 1912 (Rec., p. 23, line 45).

The net addition to reserve funds required by law, according to appellant's claim, was for 1913, $266,160.02 (Rec., p. 23, line 58), and according to appellees' claim was $81,784.67 (Rec., p. 25, line 23). Appellees contend that appellant should be charged as additional income with the difference between the decrease in liability loss reserve and the net addition to the other reserves, which would be:

	$352,252.00
	81,784.67
Under appellees' claim as to reserve funds required by law........................	$270,467.33
	$352,252.00
	266,160.82
Under appellant's claims as to reserve funds required by law......................	$86,091.18

Appellant contends that there is no provision in the law making a decrease in the amount of reserve funds required by law an item of income and that for 1913 there would be no deduction for net additions to reserve funds required by law and no fictitious addition to income due to the requirement of smaller reserve funds for 1913 than for 1912.

Statute of Limitations.

The original taxes assessed in the years 1909, 1910, and 1911 were paid respectively June 8, 1910; June 27, 1911, and June 29, 1912. No claims for a refund of the taxes so paid were filed with the Commissioner of Internal Revenue within two years from the time of such payment. February 27, 1912, the Commissioner of Internal Revenue reassessed the 1909 tax (Rec., p. 12). October 30, 1913, the Commissioner of Internal Revenue reassessed the taxes for the years 1910 and 1911 (Rec., p. 26). The Government in reassessing the taxes changed the theory upon which such assessments had been made from income received within the year, and reassessed the taxes to include, in income for the year, all premiums received or to be received from policies written during the year (Rec., p. 27). Claims for the refunding of the taxes reassessed were regularly filed with the Commissioner of Internal Revenue. The appellees contend that, inasmuch as claims for the refunding of the taxes originally assessed for the years 1909, 1910, and 1911 were not filed within two years from the time such taxes were paid, sections 3226, 3227 and 3228 of the Revised Statutes operate as a bar to the recovery of such sums so paid. The said sections, which are set up *in extenso* in the appendix, provided in substance that suit cannot be instituted to recover taxes wrongfully paid unless the claim for refund thereof is filed with the Commissioner of Internal Revenue within two years from the time such claims accrue. The time of the accruement of such claim has been held to be the date of the payment of the taxes.

February 27, 1913, the Commissioner of Internal Revenue reassessed appellant's tax for the year 1909 (Rec., p. 12). April 15, 1913, and before payment of the taxes so assessed appellant filed with the Commissioner of Internal Revenue a request that such tax be abated. October 30, 1913, the Commissioner of Internal Revenue considered the request for abatement and allowed it in part and rejected it in part (Rec., p. 13). November 13, 1913, appellant paid the tax so assessed. August 14, 1914, appellant filed a claim for refund of the additional taxes paid November 13, 1913, and April 30, 1915, filed a claim for recovering all of the additional taxes paid November 13, 1913. Suit was instituted February 8, 1916, which date was more than two years from the date of the disallowance of the abatement claim and payment of tax. It is contended by the appellees that appellant's right of action accrued November 13, 1913, and that the two-year period within which a claim could be filed with the Commissioner of Internal Revenue under the sections above mentioned commenced to run on such date. The appellant contends that under the sections of the statute above mentioned it had the right to file a refunding claim with the Commissioner of Internal Revenue within two years from the time of the payment of the tax and to commence its suit within a two-year period thereafter. This question is presented to the court for decision.

ASSIGNMENT OF ERRORS OF LAW.

1. The court erred in holding that appellant should be charged under the act of August 5, 1909, in its income for any given year, with premiums on its insurance policies collected by its agents in such year for remittance to it but unremitted to it in such year.

2. The court erred in holding that appellant should be charged under the act of October 3, 1913, in its income for any given year, with premiums on its insurance policies collected by its agents in such year for remittance to it but unremitted to it in such year.

3. The court erred in holding that appellant should be charged under the act of August 5, 1909, in its 1909 income, with premiums paid in 1909, but which accrued in 1908 on insurance policies issued in 1908.

4. The court erred in holding that appellant should be charged under the act of October 3, 1913, in its 1913 income, with premiums paid in 1913, but which accrued in 1912 on policies issued in 1912.

5. The court erred in holding that appellant could not deduct from its gross income under the second deduction provided for in subdivision 2 of section 38 of the act of August 5, 1909, the net addition to reserve funds required to be maintained by it by the insurance department of the State of New York.

6. The court erred in holding that appellant could not deduct from its gross income under the second deduction provided for in subdivision 2 of section 38 of the act of August 5, 1909, the net addition to reserve funds required to be maintained by it by the insurance department of the State of Wisconsin.

7. The court erred in holding that appellant could not deduct from its gross income under the second deduction provided for in section 2, division G (*b*) of the act of October 3, 1913, the net addition to reserve funds required to be maintained by it by the insurance department of the State of New York.

8. The court erred in holding that appellant could not deduct from its gross income under the second deduction provided for in section 2, division G (*b*) of the act of October 3, 1913, the net addition to reserve funds required to be maintained by it by the insurance department of the State of Wisconsin.

9. The court erred in holding that a decrease in reserve funds required by law in a tax year, as compared with the reserve funds required for the preceding tax year, caused a corresponding increase in income for the taxable year, and that appellant should be charged in income with the amount of such decrease in reserve funds for the year 1913 under the act of October 3, 1913.

10. The court erred in holding that appellant could not deduct from gross income under the second deduction provided for in subdivision 2 of section 38 of the act of August 5, 1909, the net addition to its reserve funds, due to and arising from an increase in its reserve funds covering accrued losses on its policies of insurance other than employers' liability policies for the years 1911 and 1912 under the act of June 1, 1911, of the State of Pennsylvania (P. L., 607).

11. The court erred in holding that appellant could not deduct from gross income under the second deduction provided for in section 2, division G (*b*) of the act of October 3, 1913, the net addition to its reserve funds due to and arising from an increase in its reserve funds covering accrued losses on its policies of insurance other than employers' liability policies for the year 1913 under the act of June 1, 1911, of the State of Pennsylvania (P. L., 607).

ARGUMENT.

(A.) Under the act of August 5, 1909, was the income of appellant, by which the tax was measured, that which was received by it during the tax year, or did it include income accrued but not received during the tax year?

Income, in its ordinary sense, means that which comes in or is received, and necessarily means cash or its equivalent.

> Mutual Benefit Life Insurance Co. *vs.* Herold, 193 Fed., 199, 214.
>
> U. S. *vs.* Schillinger, 14 Blatchford, 71.
>
> *In re* Murphy, 80 N. Y. Supp., 530-533; 22 Cyc., 66, and cases cited.

All words used in statutes are modified by and vary according to the circumstances and time of use.

> Towne *vs.* Eisner, 245 U. S., 418-425.

An examination of the statute will therefore shed material light upon the proper construction of the meaning of taxable income as used in the statute.

Section 38 of the act of 1909 provides that every corporation shall be subject to pay annually a tax "equivalent to one per cent upon the entire net income over and above $5,000 *received by it* from all sources during such year, exclusive of amounts *received by it* as dividends," etc., and in case of a foreign corporation "upon the amount of net income over and above $5,000 *received by it* from business," etc., "exclusive of amounts so *received by it* as dividends upon stock," etc.

The second section of section 38 provides that "such net income shall be ascertained by deducting from the gross amount of income of such corporation * * * *received* within the year from all sources:

1. All the ordinary and necessary expenses actually *paid within the year* out of earnings * * *.

2. "All losses actually sustained *within the year,* * * * and in the case of insurance companies the sums other than dividends paid *within the year* on policy and annuity contracts and the net addition, if any, required by law to be made *within the year* to reserve funds."

3. "Interest actually paid *within the year,* * * * and in the case of a bank * * * all interest actually paid by it *within the year* on deposits."

4. "All sums paid by it *within the year* for taxes" * * *.

5. "All amounts received by it *within the year* as dividends," etc., and in the case of foreign corporations it provides that such net income shall be ascertained by deducting from the gross amount of its income received *within the year* * * * deductions similar to those provided for domestic corporations, all of which deductions are for payments made *within the year* except the fifth deduction.

Under subsection 3 of section 38 the corporation subject to a tax is required to report to the Commissioner of Internal Revenue, and such report is required to show, besides, the capital stock and the bonded and other indebtedness.

Third. "The gross amount of the income of such corporation * * * *received* during such year from all sources, and if organized under the laws of a foreign country the gross amount of its income received *within the year,* * * * also the amount received by such corporation * * * *within the year* by way of dividends * * *."

Fourth. "The total amount of all ordinary and necessary expenses *actually paid* out of the earnings * * * *within the year* * * *."

Fifth. "The total amount of all losses actually sustained during the year, * * * and in the case of insurance companies the sums other than dividends paid *within the year* on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds * * *."

Sixth. "The amount of interest actually paid *within the year* * * *."

Seventh. "The amount paid by it *within the year* for taxes * * *."

Eighth. "The net income of such corporation * * * after making the deductions in this section authorized."

(Italics added by appellant.)

The tax is to equal one per cent of the income *"received"* by a corporation *"during"* the taxable year. The meaning of these words is clear and unambiguous and a simple reading of the statute is the strongest argument that appellant can advance that the income by which the tax is to be measured is income received within the year. There is no intendment deducible from the statute that moneys or property not received during the year are part of income. The second subdivision of the act provides how the net income shall be ascertained, and entirely removes any ambiguity as to its construction and sets at rest any doubt as to its meaning. The method of ascertaining the net income by which the tax is measured provides that the minuend, used in determining such income from which all deductions are made, shall be the gross amount of the income received within the year from all sources, and that each and every deduction from such minuend shall consist of sums "actually paid within the year," "actually sustained within the year," "paid within the year," "required by law to be made within the year," and sums "received by it within the year." The same deductions from gross income received within the year are allowed to foreign corporations by the law in order to ascertain their net income.

No deductions are allowed from gross income which have not been paid out or set aside during the tax year except deduction five. If it had been the intention of Congress to include in income that which had accrued but had not been received it would have also allowed deductions which had accrued but which had not been paid. The limitation of deductions to such as have been paid within the year, by implication limits receipts to those which have been received within the year. There would neither be fairness nor justice in a law which included in income items accrued but not received and excluded from deductions items accrued but not paid, nor has the law been so construed.

The Supreme Court has directly passed upon this question in the case of Hays *vs.* Gauley Mountain Coal Co., 247 U. S., 189–191, *et seq.;* 62 L. Ed., 1061–1063, in which case the court held, on page 192, "The expression 'income received during said year,' employed in the act of 1909, looks to the time of realization rather than to the period of accrument, except as the taking effect of the act on a specified date (Jan. 1, 1909) excludes income that accrued before that date. There were further differences upon which we need not dwell." "As we construe the latter act, *it measured the tax by the income received within the year for which the assessment was levied,* whether it accrued within that year, or in some preceding year, while the act was in effect; but it excluded all income that accrued prior to January 1, 1909, although afterwards received while the act was in effect." (The italics added by appellant.)

From the case above cited and the reasons above stated it seems clear that under the act of 1909 only income received during the taxable year should be included in the income of the corporation for the taxable year, but as the 1913 act is also subject to consideration in this suit it was deemed necessary by appellant to more fully set up and discuss the 1909 law than otherwise would have been necessary.

(B) Under the act of October 3, 1913, was the taxable income of the appellant that which was received by it during the tax year or did it include income accrued but not received during the tax year?

The same general statements heretofore made as to what is income are applicable to this discussion.

The act of 1909 was an excise tax. The method of measuring the tax to be paid, however, was based upon the income of the corporation for the taxable year. The act of 1913 was an income tax, the amount of the tax being based upon the income of the corporation for the taxable year. Although one tax is an excise tax and the other tax is an income tax, nevertheless the amount of each tax is based upon income, and in so far as the acts are similar in their wording the construction placed upon the act of 1909 by this court would be controlling as to the construction to be placed upon the act of 1913.

There are some slight distinctions in the wording of the two acts, and in discussing the two acts the appellant refers to those sections of the act of 1913 which apply to corporations, namely: section "G" and its subdivisions, and section "S."

In that part of section 38, act of 1909, providing for a tax and making income the measure thereof, the income is specified as that which is "received by it from all sources during such year." In that part of section "G" (*a*) of the act of 1913, which provides for a tax assessment upon net income of a corporation, such net income is described as that "arising or accruing from all sources." There is here a change in the wording of the 1913 statute from that of the 1909 statute, and if the words of the 1913 statute were not modified, there might be reason in the argument that the words "arising or accruing" meant income which accrued within the year, but which had not been paid. A further analysis of the statute, however, shows that the same method of ascertaining the income under the 1913 act is provided as was provided for the 1909 act. Section "G" (*b*) provides how the taxable net income of a corporation shall be determined and what deductions shall be allowable from the corporation's income for the taxable year. The 1913 act in section "G" (*b*) provides for the same minuend for determining the income from which all deductions shall be made as was provided in the 1909 act. Such minuend is in each instance "the gross amount of the income of such corporation, joint stock companies or associations, or insurance companies, *received within the year from all sources.*" In other words, the statute provides that the gross income of the corporation for the taxable year is income *received* by it within the year. If, in determining taxable income, the statute starts with a minuend which represents only income received within the year, it is exceedingly difficult to understand where, unless there is separate statutory provision, those items of income which have accrued during the year but have not been paid are to be added. There is no separate statutory provision for adding to the gross amount of income received within the year from all sources by the corporation the amount of income accrued to it but not received by it within the year. Nor does there seem to be any good reason why accrued but not received income should be added to the taxable income ascertained as provided by statute. Indeed, there is good reason why accrued but not received income should not be added. Each and every deduction from gross income provided for in the act of 1913 is a deduction based upon items paid within the year and not upon items accrued within the year, but not paid.

First. The first deduction allows expenses "paid within the year."

Second. The second deduction allows losses actually sustained within the year and the net additions required by law to be made within the year and sums other than dividends paid within the year, and has a proviso thereto that mutual fire insurance companies are required to return as taxable income "all income received by them from all other sources," and mutual marine insurance companies are required to include in gross income "premiums collected and received by them."

Third. The third deduction allows interest accrued and paid within the year and in two provisions allows deductions for interest only if paid within the year.

Fourth. The fourth deduction requires taxes to be paid within the year if allowable as a deduction.

There are no changes worthy of note in the deductions allowed in the 1913 act as compared with the 1909 act. In the third deduction the word "accrued" was added, but the word "paid" was left in, so that the change effected, if one was effected, would be to require that the interest paid must also have accrued within the tax year. In the proviso affecting foreign corporations there was a change, the 1913 act providing that "such net income shall be ascertained by deducting from the gross amount of its income accrued within the year from business transacted and capital invested within the United States" the deductions provided for domestic corporations.

Inasmuch as the 1909 law has been construed by this court and as there are no material differences between the method provided by the 1909 law and the 1913 law for the ascertainment of taxable income, it is manifest that the same construction should be placed upon the 1913 law as was placed upon the 1909 law, and that the income which is subject to taxation under the 1913 law is income received during the taxable year.

The act of 1913 has been before this court for construction in a number of cases, and the meaning of the word "income" as used therein was construed by this court in the case of the Southern Pacific Company *vs.* Lowe, 247 U. S., 330.

In passing upon the question as to whether accumulations accrued to a corporation prior to January 1, 1913, were capital or income, the court held, as follows:

> "Certainly the term 'income' has no broader meaning in the 1913 act than in that of 1909 (see Stratton's Independence *vs.* Howbert, 231 U. S., 399–417; 58 L. Ed., 285, 293; 34 Sup. Ct. Rep., 136), and for the present purpose we assume that there is no difference in its meaning as used in the two acts."

It may be assumed, therefore, that the 1913 act operates upon income received within the tax year and not upon income accrued within the year but not received within the year. Such was the ruling of the lower court relative to the necessity of the receipt of the income within the tax year under both the 1909 act, as the measure of the tax, and under the 1913 act, as the subject of the tax. No error is assigned upon this ruling of the court, but inasmuch as the Supreme Court in appeal cases discusses and decides questions appearing in the record to which no error has been assigned, it seemed advisable, as this question is a material one, that a brief discussion thereof should be made.

(C.) Under the act of August 5, 1909, were premiums in the hands of agents for collection and remittance income received by appellant before such premiums were remitted and accounted for by such agents to appellant?

The relation between appellant and its agents is determined by the contract existing between it and its agents. The agent has no greater authority or larger powers than are provided in the contract of agency.

Parsons *vs.* Armor *et al.*, 3 Peters, 413; 7 L. Ed., 724.

The contract between appellant and its agents is therefore necessary to be considered and construed in order to determine whether receipt of premiums by the agent should be considered as receipt of the premiums by the prinicipal. In the first place, it should be noted that none of appellant's agents were general agents in the sense that they represented appellant in all matters. In the first paragraph of the contract quoted in the statement of fact the agents of appellant are called general agents, but in the very sentence in which they are denominated general agents of appellant, their power as general agents is limited both as to the scope of their authority and as to the territory within which they can exercise it. They are appointed general agents *"for the procuring of business for the company."* There is no authority, either general or special, granted in this paragraph under which they could collect or receipt for premiums due the company from insurance procured by them for the company. The authority here granted is no broader than that granted to general sales agents whose duty is to sell goods or agreements, but who have no authority to collect for such goods or agreements; and under the second paragraph of the contract, as quoted in the statement of facts, the power of appellant's agents as to premiums is *expressly* limited, namely: *"and to the prompt collection of and remittance for all premiums payable for such insurance."* The agent under this contract in no sense represented the principal as a depositary or holder of these premiums as money, nor is the agent authorized to deposit or hold the premiums as money of the principal, nor is the agent given any direction as to the use of the money. On the contrary, the agent is made simply an agent of collection and remittance, so far as the principal is concerned. The other paragraphs of the contract as quoted in the statement of facts, although touching the duty of the agent with respect to premiums, in no wise changes the power or authority of the agent as to premiums. The third paragraph allows a thirty-day extension of credit in the payment of the premium. The fourth paragraph requires a cancellation of the policy if the premium is not paid within the thirty-day credit period. The fifth paragraph provides for a monthly accounting of all premiums collected by the agent. The last paragraph provides for an accounting on the part of the agent in accordance with the general accounting due from an agent to a principal. The lower court apparently based its decision upon the fact that the agents of appellant were general agents and were entitled to receive and disburse funds of the appellant received by them, and under this theory held that inasmuch as policies written November second would, under the thirty-day credit provision, be paid to the agent December second, but not accounted for by him or remitted to appellant by the agent until January of the following year, appellant should be charged with the premiums so received by the agent. There is no question raised in this case as to the necessity, from a business point of view, for the method of accounting existing between the appellant and its agents. It would indeed be peculiar if the agent should be required to remit to a principal at a distance every premium for insurance received by such agent at the time of such receipt. Where monthly credit is given a monthly accounting period is not unusual, nor has its reasonableness been questioned, nor could a thirty-day credit system and a monthly accounting system be questioned in the transaction of business such as that of appellant, where its transactions extend over all of the States and Territories of the United States. It is not contended that appellant received any benefit from the funds in the hands of its agents, or could have forced an accounting from its agents at an earlier period than was provided in the contract. It would indeed be strange if appellant should be charged with income of which it did not have the use or the power to command the use. Can it be said, and is it the law, that if a creditor sends to a firm of attorneys for collection and remittance a claim against a debtor, that the creditor is to be charged with the amount collected upon such claim as of the date paid to the attorneys, instead of as of the date the creditor receives the proceeds of the collection from such attorneys? Can it be possible that a merchant delivering to a collector accounts for collection and accounting at thirty-day periods is to be charged with the proceeds of such collections as of the date paid to such collector and not as of the date such collector accounts to the merchant? Is it the law that if an individual draws a sight draft upon another individual at a distance and turns such sight draft over to his bank for collection, that he is chargeable with the proceeds of such sight draft as income as of the date paid to his banker's correspondent and not as of the date such proceeds are deposited to his credit by the bank to which he turned the draft over for collection?

The contention was raised by the appellees in the lower court that payment to agent was payment to principal. The question whether payment to agent is payment to principal is ordinarily a question arising between the principal and persons discharging an obligation or acquiring rights by payment to the agent, and is an entirely different question than the one herein presented, where the issue is the time of receipt of such payment by the principal. As between the principal and such persons there is no question but that payment to agent under all ordinary circumstances is payment to principal. As between principal and agent it is equally clear that payment to the agent is not receipt of payment by the principal. After a most careful review of authorities, appellant has found this question directly presented twice in the history of litigation. In each instance the court has held that payment to agent, as between principal and agent, is not receipt of payment by the principal.

In Mutual Benefit Life Insurance Co. *vs.* Herold, 198 Fed., 199–214, in speaking of uncollected premiums, the court held—

> "The uncollected premiums are stipulated premiums which have fallen due, or concerning the payment of which the company has not been advised at its home office. The company not having received

> the full amount of the uncollected premiums outstanding at any time, and does not enter them on its book of account, except as actually received at the home office * * *. It seems to border on absurdity to speak of income as including that which has not been received andwhich under the ordinary uncertainties of business may never be received * * *. The same is true of uncollected and deferred premiums. It is manifestly impossible to tell when, if ever, they will be paid."

This case was affirmed by the court of appeals and a motion for certiorari to this court was denied (231 U. S., 755). The reasoning of this case is clear and has already been considered by this court. Appellant's agents had the disposal of the sums collected until remitted to appellant, and, therefore, such funds were not income of appellant until received by it. Further, the amount of the premiums that appellant would receive could not be determined until they were actually received by appellant. The same question came up in different form in the case of Crookson Bros. *vs.* Furtado, No. 316, Court of Exchequer (S. C. T.), Second Division, first and second of November and eighth of December, 1910, vol. 5, Great Britain Tax Cases, pp. 602–618.

In this case certain French merchants had agents in Glasgow, whose duty it was to collect and remit to them accounts due the French merchants from Scotch debtors. The Government maintained that the funds collected by the agents in Scotland was money in the hands of such agents belonging to the French merchants, and hence that payment to agent was payment in fact to the principal. The court held as follows:

> "After the checks or drafts reached the hands of the company's authorized agents there, who signed and delivered receipts for them in the name of their principals, it would, I apprehend, be impossible for the company to deny, in a question with the purchasers, that payment has been made to it—made

> as I hold in Glasgow. But it does not follow—is not in my opinion the case—that agents in merely transmitting checks, etc., to Paris were persons, 'having the receipt of any profits or gains * * * belonging to the company.' "

The character of the ownership of money collected by an agent for subsequent remittance to his principal is shown by the following examples: Money in the hands of an agent for remittance to his principal is not subject to attachment, because the money in the hands of the agent is not strictly the money of the principal until paid over by the agent to the principal. The facts in the case of

Maxwell *vs.* McGee, 66 Mass., 137, were as follows:

An attorney by the name of Maxwell had collected money for his principal by the name of Peck, and this money had been attached in the hands of the agent by a creditor of the principal. The court in disposing of the case held:

> "We do not mean to say, that the money of a debtor may not be attached by an officer, if he can find it and take it without committing a trespass; no doubt it may be. But in this instance it had not become the property of Peck. We do not place this decision on the fact that, in this case, the plaintiff, with the consent of Peck, had become liable to pay part of the proceeds to Hayes, who produced the note and delivered it to him, and who had some claims upon it which were sanctioned by Peck, the debtor; though this fact illustrates the position. But independently of this, Maxwell by receiving the money as attorney of Peck, became liable to account to him for it. He might have claims upon it for his own fees or for charges to others. He might discharge his liability to his principal by paying him in lawful currency. The money was not strictly that of Peck until paid over; but the identical pieces of money collected are not necessary to be paid over to him. Until that be done, his right is a chose in action."

This case clearly shows the reason why attachment is not used as a remedy in cases where an agent has funds in his hands which it is his duty to account for to his principal. The principal has not received nor is he in possession of, even constructively, the money collected by the agent. The principal has a right to an accounting from the agent, not a right to the money collected by the agent. This is the situation in the case now being considered by this court. The appellant had not received the money collected by its agents; its right was a right to an accounting under the terms of its contract with its agents, and it would not receive any income therefrom until the accounting was made and the money paid to it.

The action of trover does not ordinarily lie in favor of a principal against an agent. In the case of

Vandell *vs.* Rohan, 73 N. Y. S., 285,

the court, in passing upon the question as to whether the action of trover would lie for sums collected by an agent, held:

> "In other words, where the master sends his servant to the bank to cash a check, or to a customer to collect a bill, the servant who is entrusted with a mere temporary possession, is bound forthwith to carry the money to the master, or he becomes civilly liable for the conversion thereof, and criminally for that species of larceny called embezzlement. But in the case of a factor or agent where a limited credit is given, and the proceeds are generally remitted to his principal by the bank checks of the factor or agent, no obligation as to the specific money attaches, and neither an action of trover for conversion, or a criminal charge of embezzlement will lie."

The New York rule was later changed by statute, and after passage of the statute the courts in construing it placed a liability for conversion upon the agent. In the case of

Hazelton *vs.* Locke, 104 Me., 164,

the facts were almost identical with those of the present case. The question arose upon the liability of an insurance agent to the insurance company for premiums collected by him, and the court, in determining that an action of trover would not lie, held:

> "3. In determining from the circumstances and relation of the parties whether trover or assumpsit is the proper remedy, it is necessary to consider the distinctive quality of money as differing from other kinds of property, and the character and conduct of the defendant in receiving and retaining the money in question. From its nature the title thereto passes by delivery, and its identity is lost by being changed into other money or its equivalent in the methods ordinarily used in business for its safe-keeping and transmission. An agent, unless restricted by the terms of his contract, would violate no duty assumed by him by adopting these methods in dealing with the money of his principal. Mere failure to deliver such property in specie on demand would not be technical conversion, nor would the refusal to pay over its equivalent be conclusive evidence of conversion in the sense of the law of trover, but might be the ground for an action of assumpsit."

Surely, if the action of trover would not lie against the agent for the conversion of the funds in his hands representing collections of premiums to be accounted for, by him to his principal, it could not be claimed that the funds were even constructively in the hands of the principal, and it would seem, that these cases would determine the question now before the court.

This court has held in the case of

Henneguin *vs.* Clews, 111 U. S., 676,

that a discharge in bankruptcy secured by an agent who had in his hands funds for which an accounting was due to his principal discharges the agent from all liability thereon. In this case the court construed the bankruptcy act of 1867, the particular section being 5117, which reads as follows:

> "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary capacity, shall be discharged under this act."

This case has been cited many times in the State and Federal courts, and the reasoning upon which it is based seems to set at rest the question as to whether the funds held by the agents of appellant in this case prior to accounting were the funds of the principal or were the funds of the agent regarding which an accounting was due to the principal. If the discharge of the agent in bankruptcy proceedings operates as a discharge of an obligation to his principal, it is apparent that his obligation is the duty to account to his principal, and not a duty as the holder of property belonging to him. It follows, therefore, that the funds in the hands of appellant's agents were not received by it until remitted to it by its agents.

It is indeed difficult to understand upon what theory a company can be charged with collections made by its agents as of the date such collections are made by the agents instead as of the date such collections are received by the principal. This is particularly true where such agents, as in the instant case, are merely agents for collection and remittance, and appellant should not be charged with premiums collected by its agents until such premiums are received by it.

(D.) Under the act of October 3, 1913, were premiums in the hands of agents for collection and remittance income received by appellant before such premiums were remitted and accounted for by such agents to appellant?

The same argument applies to the 1913 act as applies to the 1909 act, and appellant maintains that it should not be charged with income until such income is received by it.

(E.) Under the act of August 5, 1909, were premiums which had accrued prior to January 1, 1909, part of the income of appellant for the year 1909 by which its tax for such year was measured?

The case of Hays *vs.* Gauley Mountain Coal Co., 247 U. S., 189-191, decides that income accruing prior to January 1, 1909, is not a part of the income of the taxpayer and is not to be included in the taxpayer's income for the year 1909. Therefore appellant should not be taxed upon the premiums accrued in 1908 upon policies issued in 1908, amounting to $584,164.18, but paid to appellant during the year 1909.

(F.) Under the act of October 3, 1913, were premiums accrued in the year 1912, but not paid until the year 1913, part of the taxable income of appellant for the year 1913?

The above question is decided by the case of Southern Pacific Co. *vs.* Lowe, 247 U. S., 330-334, where it is held that accumulations accrued to a corporation prior to January 1, 1913, are capital and not income and are not subject to the tax and, therefore, the appellant should not be taxed upon the premiums accrued to it upon policies issued in 1912, but paid to it in 1913, amounting to $1,020,616.32.

(G.) Under the act of August 5, 1909, the second deduction from gross income of which allows appellant to deduct the net addition, if any, required by law to be made within the year to reserve funds, was appellant entitled to deduct from gross income the net additions to reserve funds required to be maintained by it under the statute law of the State of New York by the department of insurance of that State?

Deductions are allowed in the statute because such items appeared to Congress as of a character not properly to be included in the sum from which they are allowed to be deducted. Congress, in the 1909 tax act, provided for a deduction in case of insurance companies equaling the net addition, if any, required by law to be made within the year to reserve funds, and such deduction was reasonable under the law and logical in view of the insurance business. The act is one which measures the tax by the income received, and by income received is meant income which can be used. If an insurance company is required by law to take from its income moneys and place them in a reserve fund, then the insurance company does not have the use of the money so placed in a reserve fund, and should not pay a tax thereon as though such money were income which it could use. In other words, the law allows as a deduction from gross income the net addition to reserve funds which is not income, because it is impossible for the insurance company to use it on account of lawful restrictions.

The insurance business is not ordinary manufacturing or mercantile business. It does not deal with raw material and it cannot be charged with income received from the sale of its finished product or insurance policies, and credited with the cost of its raw material plus the expense of production. The premiums received by an insurance company, which are the largest item of its income, are not in fact wholly income but are in part the fund or principal sum from which the losses accrued upon the insurance policies sold by the company must be paid. This is the reason why the State legislatures throughout the country have enacted laws regulating very strictly insurance companies and have required that their financial condition be more than solvent, and this is why the insurance departments in various States have required insurance companies, other than life companies, to maintain reserve funds equal to all other outstanding liabilities, including funds sufficient to reinsure in responsible companies the outstanding risks which they carry.

For these reasons it would seem that so much of the income of appellant as is set aside to maintain the increase in reserve funds is not usable by appellant and is not in fact income of appellant, but is a sum held by appellant in qualified trust, and that such sum should not be included in the income of appellant, which is the measure of the tax.

The wording of the deduction is not involved nor are there used words that are unusual or are ordinarily of doubtful meaning. The phrase "reserve funds" and the phrase "required by law" are the only phrases of the clause which require construction. The phrase "reserve funds" is not ambiguous in itself and should be given its ordinary meaning, unless some good reason exists for a forced or a limited construction.

The popular or received import of words furnishes a general rule for the interpretation of public laws as well as of private and social transactions.

Maillard *vs.* Lawrence, 16 How., 251.
Arthur *vs.* Morrison, 96 U. S., 108-111.
Greenleaf *vs.* Goodrich, 101 U. S., 278-284.
Cadwalader *vs.* Zeh, 151 U. S., 171-176.
Glover *vs.* United States, 164 U. S., 294-297.

The legislature must be presumed to have intended to use language in its ordinary meaning, unless it would manifestly defeat the object of the provision.

Minor *vs.* Mechanics Bank, 1 Pet., 46.

The statute should be read according to the natural and obvious import of its language, without resorting to subtle and forced construction. For the purpose of either limiting or extending its operation, and when the language is plain, words or phrases should not be inserted so as to incorporate in the statute a new and distinct provision.

United States *vs.* Temple, 105 U. S., 97.
United States *vs.* Graham, 110 U. S., 219.
United States *vs.* Hill, 120 U. S., 169-180.
United States *vs.* Lynch, 137 U. S., 280-285.
Houghton *vs.* Payne, 194 U. S., 88-100.

The phrase "reserve funds" should not be confused with the phrase "reserve fund." The latter phrase when used in connection with the business of life insurance has received a special meaning. Such cases as:

Fuller *et Ux. vs.* Metropolitan Life Insurance Company, 70 Conn., 647.
State *ex rel. vs.* Vandiver, 213 Mo., 187.
Bankers Life Insurance Company of N. Y. *vs.* Howland, 73 Vt., 1.
Wright *vs.* Minnesota Mutual Life Insurance Company, 193 U. S., 657;

and cases of a similar character, only referred to the phrase "reserve fund" as applied to life insurance and are not a guide to the meaning to be attached to the phrase "reserve funds" as used in the act, which is not limited to life insurance companies, but applies to insurance companies of every character. Life insurance business is the oldest of all insurance business and in connection with it there was early established a reserve fund that in some instances meant "legal reserve," in other instances "legal net value," and in still other instances "premium reserve." The reserve fund so maintained by life insurance companies is not the same reserve funds as are maintained by fire insurance companies, guarantee insurance companies, casualty insurance companies, and many other insurance companies which transact a different kind of insurance business, and require different reserves, based on different conditions, in order to make their policies secure. The following is a good illustration of the different conditions under which insurance companies operate which require a different character of reserve funds: from the books of a casualty insurance company a reserve could not be figured using the life insurance rule. In other words, the various kinds of insurance business require various reserve funds, covering the particular risks and hazard which each insures. This is the reason why the term "reserve funds" is used in the statute and not the term "reserve fund." Congress did not intend to limit the operation of the statute to life insurance companies or to any particular kind of reserve fund, but did include and did intend to include all "reserve funds" required by law.

There would seem, therefore, to be no reason why the term "reserve funds" as used in the act should be limited in any way in its meaning. On the contrary, in order that all insurance companies may come under the terms of the act, it is clear that the term "reserve funds" should mean any fund held in reserve, as is the commonly accepted meaning of the term reserve.

"Literally speaking, the reserve fund is one held in reserve."

Dawson's Elements of Life Insurance, page 183.

"That which is kept back or reserved, as for future use."
"(Banking.) Funds kept on hand to meet liabilities."
Webster's International Dictionary.

"(2.) That which is reserved or kept for other or future use; that which is retained from present use or disposal."
Century Dictionary and Cyclopedia."

The appellant from the year 1909 to the year 1912, inclusive, conducted its business in the State of New York and was by the department of insurance of the State of New York required to maintain reserve funds sufficient in amount to cover all its accrued but unpaid indebtedness. The office of the superintendent of insurance and the department of insurance of the State of New York is statutory and in 1909 was covered by chapter 33 of the Consolidated Laws of the State of New York.

Under section 9, chapter 33, corporations and individuals are precluded from doing insurance business in the State of New York without a certificate from the superintendent showing that such individual or corporation has met the requirements of law and is authorized to transact such business. The superintendent may refuse a certificate to a foreign corporation if, in his judgment, such a refusal will best promote the interest of the people of the State. It was under this section that appellant applied for its license to engage in the insurance business in the State of New York and it was under this section and others that the superintendent of insurance required appellant to maintain reserve funds sufficient to cover all its outstanding indebtedness.

Under section 32, chapter 33, appellant was compelled to yearly secure a new certificate, and each year met the requirements as to the conduct of its business which were prescribed by the superintendent of insurance. If appellant did not meet the requirements prescribed by the superintendent of insurance its certificate of authority to transact business within said State of New York during the following year would not be granted.

Under section 86, chapter 33, directions were given to the superintendent of insurance how to estimate the condition of a casualty insurance company, and in considering the condition of such insurance company the superintendent was directed to consider only such assets as were authorized by the laws of the State and to charge as liabilities in addition to the capital stock all outstanding indebtedness of the corporation and the premium reserve on policies and a further reserve upon employers' liability insurance losses.

Under sections 9 and 32, the superintendent of insurance was authorized by law to require the appellant to establish and maintain a financial condition such as seemed to him to "best promote the interest of the people of the State," or as would place appellant in such a position that it might "be safely intrusted with the continuance of its authority to do business," and in default of the maintenance of such required financial condition to refuse to allow appellant to transact business in the State. The superintendent under such authority required appellant to maintain reserve funds sufficient to cover all its outstanding liabilities.

The power of the superintendent of insurance, under the New York statutes, to exercise his discretion in declining to issue a certificate of authority to transact business in the State of New York, has been decided affirmatively by the New York courts. In the case of

> People *ex rel.* Hartford L. & A. Insurance Co. *vs.* Fairman, 12 Abbott's N. Y., 252-259,

the facts and holding of the court were in substance as follows: The relator at one time had a certificate allowing it to sell insurance in the State of New York. Its license was threatened to be revoked by the superintendent, and the relator thereupon changed its name, and applied for a certificate to do business in the State of New York under the new name. The court held, page 259:

> "If, on the other hand, this relator having once ceased, as it might, to do business in this State, desired again to renew its business here, then the matter rests with the superintendent to refuse admission if he thinks best (L. 1873, c. 593, section 2). Nor do I feel sure that an annual request for a renewal of authority is not a new application to be permitted to transact the business of insurance in this State under that section. It is familiar law that the right of a corporation of another State to do business here depends upon the permission of this State, and a re-

> newal of authority is only a new permission, but it is unnecessary to decide that point."
>
> "It is also unnecessary to discuss the merits of the scheme called 'Safety Funds Certificate Business,' although it is not difficult to see what the operation of it will be in the result. That is a matter, if this be treated as a new application, solely within the discretion of the superintendent."

The case was affirmed on appeal (91 N. Y. R., 385-6). That part of chapter 593, section 2, laws of 1873, referred to, is as follows:

> "The said superintendent shall have power to refuse admission to any company, corporation, or association, applying to be permitted to transact the business of insurance in this State from any other State or foreign country, whenever, upon examination, the capital of such company, corporation, or association shall be impaired, and also whenever in his judgment, such refusal to admit shall best promote the interest of the people of this State."

In the case of the

> People *ex rel.* Equitable F. & M. Insurance Co. *vs.* Fairman, 12 Abbott's N. Y., 268–269,

the facts were similar to those in the preceding case and involved the application of L. 1873, c. 593, sec. 2. The superintendent declined to issue a license to relator, basing his refusal upon his right to exercise his discretion, provided by the statute, to grant or to withhold from foreign insurance companies the certificate asked for by relator. The relator denied this power and urged that the statute was unconstitutional, as it delegated legislative power to the superintendent. The request for a writ of mandamus was denied by the lower court and this decision was affirmed on appeal (92 N. Y. R., 656).

It should be noted that the wording of that part of section 2, chapter 593, L. 1873, empowering the superintendent of insurance to exercise his judgment in admitting or refusing to admit a foreign insurance company to do business in the State, is the same to all intents and purposes as appears in section 9 of chapter 33 of the Laws of 1909.

The two decisions above stated have become settled law in the State of New York, no further or other case having arisen upon the question of the legal authority of the superintendent to use his discretion in making such requirements for insurance companies as he saw fit as a condition to their doing business in the State of New York.

A similar question has arisen under section 91 of chapter 33 of the consolidated laws of 1909, providing for the issuance of agents' licenses. Section 91 gave to the superintendent the right "to refuse to issue or renew any such certificate in his discretion," and the question at issue was the right of the superintendent to decline to issue the certificate or license, basing such refusal upon his exercise of discretion. The powers granted to the superintendent are not materially different under section 91, covering agents' licenses, from the powers granted to him by sections 9 and 32 of the same act, covering licenses to companies. In the case of

> Stern *vs.* Metropolitan Life Insurance Co., 169 App. Div., 217; 217 N. Y. R., 626,

the court held that under section 91 the superintendent had authority to refuse an agent's license and to assign as a reason therefor the exercise of his discretion, and such decision by the appellate division was affirmed by the appellate court. It was urged, both in the lower court and in the appellate court, that the granting to the superintendent of insurance of the discretionary power to refuse certificates was violative of the Fourteenth Amendment to the Constitution of the United States, by depriving a person of his rights without due process of law. The higher courts of the State of New

York, in dealing with this question, based their decision upholding the constitutionality of the insurance law vesting discretionary power in the superintendent upon the case of

> New York *ex rel.* Lieberman *vs.* Van De Carr, 199 U. S., 552–562,

and particularly upon that part of the opinion of this court reading as follows:

> "These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the State is not violative of rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under the sanction of State authority, this court has not hesitated to interfere for his protection, when a case has come before it in such manner as to authorize the interference of a Federal court."

It therefore follows that under the law of the State of New York the insurance superintendent is vested with legal discretion to permit or not to permit foreign insurance companies to transact business within the State of New York. Such authority so to act is vested in him by the statute laws of the State of New York, and whatever action he takes is under and by virtue of the statute laws of the State of New York. Moreover, the statutes vesting such discretion in the superintendent of insurance are legal and valid under the laws of the State of New York and also under the Constitution of the United States. In the exercise of such discretion and as a prerequisite to the issuance of a certificate to appellant to transact business in the State of New York, the superintendent required appellant to maintain reserve funds sufficient to cover all of its outstanding liabilities. In thus making such requirement the superintendent acted under the authority vested in him by the statutes of the State of New York and, unless such requirement is arbitrary, the exercise thereof is warranted by and taken under the State laws and sanctioned by the Federal Constitution.

No question is raised as to whether the requirement of the various insurance departments as to reserves covering all liabilities for insurance companies was a reasonable requirement, and there is no finding of fact relative thereto. In the case, however, of such action on the part of the superintendent of insurance of the State of New York, section 86 of chapter 33 of the consolidated laws of 1909 directs the superintendent how and in what manner he shall use his discretion in estimating the condition of any casualty insurance company. An examination of section 86 shows that the superintendent is required, in estimating the condition of a casualty insurance company, to allow as assets only such investments as are authorized by the laws of the State of New York and to charge against such assets (1) *the capital stock of such corporation;* (2) all outstanding indebtedness of such corporation; (3) a reserve for unearned premiums; and (4) a reserve for accrued losses sustained on employers' liability insurance policies. The statute requires the superintendent, in considering the condition of a casualty insurance company, to take into consideration all its debts and all its assets, and in addition thereto he must figure as obligations the capital stock of the corporation. In other words, in figuring the condition of a casualty insurance company, the superintendent is required to demand that the insurance company shall have assets in excess of its capital stock in an amount equal to its outstanding liabilities. This requirement makes the assets held by the insurance company reserve assets, because they are assets in addition to its capital assets required to be held and not distributed by it. Capital stock is not an outstanding obligation of a corporation, but represents the assets of a corporation, against which it incurs liabilities and contracts obligations. Any sum required by a corporation to be held in excess of its capital assets as against obligations would be a reserve fund, and section 86 of chapter 33 of the New York laws requires the superintendent in estimating the condition of a casualty company to require a reserve fund in the form of approved liquid assets sufficient to equal the outstanding liabilities of the company. Inasmuch as the requirement of the superintendent of insurance, that appellant should maintain reserve funds equal to its outstanding liabilities in addition to its capital assets, is but enforcing, by regulation, the maintenance by appellant of the requirements set forth in section 86 *supra,* it cannot be claimed or urged that the superintendent in making such requirement acted arbitrarily or unjustly. Section 86, which the superintendent of insurance follows in requiring the reserves, is not the section of the law which provides the conditions under which an insurance company is insolvent. Section 21 provides when an insurance corporation is insolvent, and such section does not require the conditions that are specified in section 86. Under section 21, when the assets and credits of a corporation are no longer sufficient to reinsure its outstanding risks, it is insolvent. In other words, when the unearned premium reserve is no longer maintained as required, then the corporation is insolvent, for the unearned premium reserve consists of a fund merely sufficient to reinsure outstanding risks. Section 86 directs the maintenance of assets greatly in excess of the assets required of a solvent insurance corporation. The assets in excess of those required of a solvent insurance corporation by section 86 are those required by the insurance superintendent to be held as reserve funds in addition to the unearned premium reserve. The question of reserve funds under the New York statute is then, not a question of solvency or insolvency, but a question purely of the maintenance of liquid assets largely in excess of those required by a solvent concern for the purpose of making doubly sure the payment of all claims. Assets so required to be reserved by the New York law in excess of assets needed to maintain solvency are reserve funds required by law, and can properly be called by no other name. It therefore follows that the action of the superintendent requiring a reserve fund equal to all outstanding liabilities of appellant was regularly taken under the authority vested in him by the statutes of the State of New York and that such authority was not arbitrarily exercised and that such reserve funds are required by the laws of the State of New York as carried out and made effective through the requirements of the superintendent of insurance of the State of New York.

Inasmuch as the State courts of New York have decided that the New York legislature did not exceed its powers in authorizing the superintendent of insurance to exercise his discretion in granting insurance companies licenses to transact business in New York, such question is not an open one in this court and this court will follow the decision of the New York court.

> Dreyer *vs.* People of the State of Illinois, 187 U. S., 71–84; 47 L. Ed., 79–85.

From the foregoing it follows that appellant was legally required to maintain reserves equal to its outstanding liabilities as a condition of its doing business in the State of New York. It is further apparent that in case appellant did not maintain such reserves, its license to continue business in the State of New York could be by the superintendent of insurance revoked or at the beginning of any year refused to be issued by the superintendent.

The lower court held and it is contended by the defendants that appellant should be allowed to deduct from its gross income only net additions to reserve funds specifically mentioned in the State statutes, and the lower court and defendants based their contention upon the construction of the phrase "required by law," insisting that the term meant statute law, and further qualified the phrase by insisting that it means only those reserve funds specifically set up in statute law.

There are some authorities based upon the case of

> Brinckerhoff *et al. vs.* Bostwick *et al.*, 99 N. Y. R., 185–190,

from which such a rule might be deduced, but a careful analysis of the cases will show that they all arise upon a question of whether the phrases "required by law," "limited by law," etc., mean a rule of *common law* or a rule of *statute law*. There is no question but that the rules and regulations of the insurance commissioner are exercised under and by virtue of statute law and not under and by virtue of common law. These cases, therefore, are not applicable to the present case nor are they in point except in so far as the case of Brinckerhoff *vs.* Bostwick, *supra,* emphasizes the distinction herein pointed out.

Moreover, the Supreme Court of the United States has already construed the meaning of the phrase "required by law" and similar phrases.

In the case of

> Ferris *vs.* Higgley, 20 Wall., 375; 22 L. Ed., 383,

the court construed the phrase "limited by law" and determined that such phrase did not refer exclusively to statute law, but included other law.

Again in the case of

> United States *vs.* Eaton, 144 U. S., 677; 36 L. Ed., 591–594,

the court, in passing upon the character of regulations established by the Commissioner of Internal Revenue under the oleomargarine act, used the following language:

> "Regulations prescribed by the President and by the heads of Departments, under authority granted

> by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

United States *vs.* Smith, 27 Fed. Cas., 11, 75, No. 16341.
Ralph *vs.* United States, 9 Fed., 693.
United States Hearing, 26 Fed., 744.
United States *vs.* Breen, 40 Fed., 402.
United States *vs.* Hardeson, 135 Fed., 419.
United States *vs.* Van Gesner, 153 Fed., 446.
United States *vs.* Nelson, 199 Fed., 464.
United States *vs.* Bailey, 9 Pet., 238.
United States *vs.* Smull, 236 U. S., 405.
United States *vs.* Birdsall, 233 U. S., 224.
United States *vs.* Grimaud, 220 U. S., 506.
In re Kolloak, 165 U. S., 526.
Caha *vs.* United States, 152 U. S., 211.

Since the decisions in the above cases, this court has had this question before it in the following case:

United States *vs.* Jesse F. Morehead, 243 U. S., 607; 61 L. Ed., 926-929.

The case turned upon the violation of a regulation of the Land Department, which regulation was not prescribed by statute and the court held:

> "Defendant contends that this regulation, which has been enforced continuously for nearly thirty-five years, is invalid. Since the Land Department is expressly charged with the duty of enforcing the public land laws by appropriate regulations and the regula-

> tion in question was duly promulgated, the assertion of its invalidity must be predicated either upon its being inconsistent with the statutes or upon its being in itself unreasonable or inappropriate."

It will be noted that the court has considered the doctrine expressed in the Eaton case, that violation of a regulation of the department will not uphold a criminal complaint, and now holds that the violation of the regulation of a department will uphold a criminal complaint unless such regulation is inconsistent with the statutes or unreasonable or inappropriate. The regulations under which appellant maintains its reserve funds are required by the insurance departments of the various States, and it is difficult to understand in what way the requirement made by the Interior Department in the case of United States *vs.* Morehead, *supra,* is not analogous to the requirement for reserve funds made by the insurance department of appellant.

The rules of a Federal department are not different in character from the rules of commissions or departments established by State authority for the handling of State functions. This court has recognized the right of the various States to establish commissions and departments and grant to them authority to issue rules and regulations.

Stone *vs.* Farmers' Loan & Trust Co., 116 U. S., 307.
Stone *vs.* Ill. Cent. R. R. Co., 116 U. S., 347.
Stone *vs.* New Orleans and N. E. R. R. Co., 116 U. S., 352.
(Commonly known as the railroad commission cases.)
Red "C" Oil Manufacturing Co. *vs.* Board of Agriculture of North Carolina, 222 U. S., 380; 56 L. Ed., 240, and cases cited.

It would seem clear from these decisions that rules and regulations prescribed by the heads of departments are regulations prescribed by law in so far as they support acts done under them. As the regulating of reserve funds is purely a civil matter and in no sense a criminal one, these cases are conclusive as to whether, when appellant maintained its reserves by order of the insurance superintendent it was by law required to do so, and that in determining what were its net additions to reserve funds, appellant was by law required to include in its computation for any year all reserve funds which it was required to maintain by the superintendent of insurance.

McCoach *vs.* Insurance Company of North America:

The question of what net additions to reserve funds could be deducted from gross income by a fire and marine insurance company under the laws of the State of Pennsylvania arose in the case of McCoach *vs.* insurance Company of North America, 244 U. S., 585; 61 L. Ed., 1333. This case is not in point in the present case, for the reason that the judgment of the court was limited to the construction of the Pennsylvania law as requiring reserve funds, the court holding "in our opinion the reserve against unpaid losses is not 'required by law' in Pennsylvania, within the meaning of the act of Congress." The acts of Pennsylvania and the acts of New York and Wisconsin are materially different in many particulars, as fully appears from the discussion of the New York and Wisconsin laws herein contained. The Wisconsin statute is materially different from the Pennsylvania statute, in that it directly authorizes the commissioner of insurance to compute the reserve liability of casualty and suretyship insurance corporations. The New York law differs in the authority given to the superintendent of insurance to grant and revoke licenses and as a necessary power incident thereto to prescribe such rules as are necessary to make uniform the conditions upon which he grants or refuses licenses. The New York law also differs from the Pennsylvania law in the material provisions relative to insolvency. The reserves under the New York law are in addition to assets required of a solvent corporation. For these reasons and others which are patent the decision in the above case is not controlling in the present case.

(H.) Under the act of August 5, 1909, the second deduction from gross income of which allows appellant to deduct the net addition, if any, required by law to be made within the year to reserve funds, was appellant entitled to deduct from gross income the net additions to reserve funds which the insurance department of the State of Wisconsin required it to maintain as a condition of its doing business in that State?

The insurance laws of Wisconsin and New York differ in some particulars, but the general principles underlying the power of the State to regulate insurance companies and to create insurance commissions to enforce and carry out the laws are the same, and the discussion heretofore made under the New York law is applicable to the Wisconsin law. That part of the previous discussion which deals with the meaning of the phrase "reserve funds" is applicable to the present discussion and need not be repeated.

Appellant, therefore, assumes that State legislatures have power to place the execution of the laws governing the conditions under which insurance companies can transact business under a department of insurance or under a superintendent or commissioner of insurance and to grant to such department or officer discretion to admit or exclude insurance companies from transacting business within the State, provided such discretion is not arbitrarily exercised and is applied equally to all companies. Appellant further assumes that the phrase "reserve funds" as used in the act means any funds held in reserve and includes all funds held in reserve by appellant. And hence there is left to discuss only the question as to whether under the Wisconsin statutes reserve funds equal to all of its outstanding liabilities were "required by law" to be maintained by appellant.

Appellant from the year 1909 to 1912, inclusive, conducted its business in the State of Wisconsin and was by the department of insurance required to maintain reserve funds sufficient in amount to cover all of its outstanding liabilities as set forth in its annual State reports. The office of the commissioner of insurance of Wisconsin was, prior to 1911, an elective one. After that year it became an appointed one. The laws were not materially changed except as hereinafter noticed.

Section 1966–32 of the Wisconsin statutes for the year 1898 provides that casualty insurance companies may transact business in the State upon the issuance of a license to them by the commissioner of insurance, and makes them subject to the laws of the State. Section 1972 provides that if any such company violates any of the provisions of the chapter on insurance, the commissioner of insurance may revoke its authority to do business in the State. Section 1968 provides for an examination of insurance companies applying for admission to transact business in the State of Wisconsin, and if the condition of such corporation does not fully meet the requirements of law the commissioner is directed to withhold his certificate. Section 1971, volume 3, supplement of the Wisconsin statutes in effect January 1, 1909, provides for an annual statement by all insurance companies doing business in the State. It was under these sections and under section 1966–47, commented upon in the following paragraph, that the commissioner of insurance of Wisconsin issued to appellant a license to do insurance business in the State of Wisconsin and allowed during the years 1909 to 1912, inclusive, appellant to continue its business in such State.

The commissioner of insurance of Wisconsin computed the reserve liability that appellant was required to maintain under authority derived under section 1966–47 of the statutes of Wisconsin for the year 1898, which reads as follows:

> "In computing the reserve liability of casualty insurance and suretyship corporations, the commis-

> sioner of insurance shall make such calculations as in his judgment are equitable and just to the policyholders and the company; provided that such liability so determined shall not be less than 50 per cent of the premiums written in the company's policies."

This section seems to be absolutely clear and unambiguous. Under it the commissioner of insurance would seem to be warranted in computing the reserve liability of casualty insurance companies, in requiring a reserve equal to any sum that seemed to him equitable and just and, under the holding of the New York courts as approved by this court in the case of New York *ex rel.* Lieberman *vs.* Van De Carr, *supra,* such computation is legal unless arbitrarily exercised. The only limitation upon the power of the commissioner was that such reserves so determined by him should not be less than 50 per cent of the premiums written. There is no claim in this case either that the commissioner acted in an arbitrary manner in requiring appellant to maintain reserves equal to its outstanding liabilities or that the reserve required by the commissioner was not equal to 50 per cent of appellant's premiums.

It would seem clear that the commissioner in requiring of appellant reserve funds equal to all its outstanding liabilities, acted directly under the authority and mandate of section 1966–47, *supra,* and that in so doing he carried out the legal provisions as set forth in such section. In the case of

> McCoach *vs.* Insurance Company of North America, 244 U. S., 585; 61 L. Ed., 1333,

the court took into consideration, though it was not before it for its decision, the effect of section 8 of the insurance law of Pennsylvania for the year 1911, being the act of June 1, 1911 (P. L. 607), which reads as follows:

> "He shall in calculating the reserve against unpaid losses of casualty companies, other than losses under

> liability policies, set down by careful estimate in each case the loss likely to be incurred against the claim presented, or that may be presented in pursuance of notice from the insured of the occurrence of an event that may result in a loss; and the sum of the items so estimated shall be the total amount of the reserve * * *."

The court in discussing the act stated—

> "The act of 1911, just quoted, requires the maintenance of a substantially similar reserve, and, with respect to casualty companies, and these only, that a reserve be maintained against unpaid losses, based upon the amount of claims presented."

If in the judgment of this court section 8 of the Pennsylvania law of 1911 required a reserve to be maintained covering losses on policies other than losses on employers' liability policies, then it would seem that the language of section 1966–47, *supra,* being almost identical with that of section 8, *supra,* each section providing for the calculating of reserves by the commissioner, appellant was required to maintain reserves against all outstanding liabilities under the Wisconsin act. In other words, if section 8 of the Pennsylvania act requires reserve funds, then section 1966–47 requires reserve funds. The fact that in one statute the amount of such reserve funds is fixed and in the other statute the amount of such reserve funds is left to the determination of the commissioner does not change the situation, as the legislature of Wisconsin could legally leave to the commissioner of insurance the determination of the amount to be required of appellant.

If the court should take the view advanced in the lower court by the appellee, that a reserve fund "to be required by law" must be specifically mentioned in the statutes of the State where it is claimed such reserve is required, regardless of whether appellant could legally be debarred from doing business in such State if it did not maintain a reserve not specifically mentioned in the statute but required by the department of insurance, nevertheless it is clear that under the Wisconsin statute, which specifically directs its commissioner of insurance to compute reserve liabilities, appellant was required by law in the State of Wisconsin to maintain reserves equal to all its outstanding liabilities.

The 1911 Wisconsin statutes did not add to the authority of the commissioner to make rules and regulations, but did provide in section 1970*p* by what method the commissioner should give notice of orders issued by him and in what manner a rehearing may be had before the commissioner on an order issued by him. It further provides for an appeal to the circuit court of Dane County, Wisconsin, from an order made by the commissioner. If there had been prior to 1911 any question as to the authority of the commissioner to make rules under the Wisconsin statutes, that question would be settled by the statute of 1911 providing for appeals from the commissioner's orders.

It is therefore submitted that appellant was required by law to maintain reserves for all outstanding liabilities under the Wisconsin statutes and that it should be allowed to deduct from its income during the years 1909 to 1912, inclusive, the net addition to its reserve funds required by law to be maintained by it, and that such reserve funds include funds sufficient to cover all outstanding liabilities.

(I.) Under the act of October 3, 1913, the second deduction from gross income of which allows appellant to deduct the net addition, if any, required by law to be maintained within the year to reserve funds, was appellant entitled to deduct from gross income the net addition to reserve funds required to be maintained by it under the statute law in the State of New York by the Department of Insurance of the State of New York?

The second deduction allowed from gross income under the act of August 5, 1909, and the second deduction from gross income allowed under the act of October 3, 1913, of section G (*b*) are identically the same, so that the argument heretofore made as to the construction of the second deduction under the 1909 act is applicable to the second deduction under the 1913 act, and the decision of this court reached under the 1909 act will be controlling as to the 1913 act.

(J.) Under the act of October 3, 1913, the second deduction from gross income of which allows appellant to deduct the net addition, if any, required by law to be made within the year to reserve funds, was appellant entitled to deduct from gross income the net additions to reserve funds which the insurance department of the State of Wisconsin required it to maintain as a condition of its doing business in that State?

The second deduction under the act of August 5, 1909, and the second deduction under the act of October 3, 1913, section G (*b*) are identically the same, and so the argument herein set forth in paragraph H of this brief is applicable to the above query, and the decision of the court thereon will be controlling hereof.

(K.) Where appellant is by law required to maintain reserve funds and in each year is allowed to deduct the net addition to such reserve funds made within the year, is appellant chargeable with the amount of net decrease in such reserve funds as income when the reserve funds required are less in the tax year than in the preceding year?

To determine whether the appellant should be charged with the decrease in the amount of its reserve funds required by law to be maintained by it, it is necessary to determine whether the decrease in the amount of such reserve funds results in income to appellant. The particular reserve fund in which the decrease under consideration in this case appears is the fund which is maintained to cover losses on employers' liability policies which had accrued and were unsettled on December 31, 1913. This particular reserve fund is maintained to secure the payment of specific losses, and the fund so held is used for the payment of the specific losses which it secures. The reserve funds maintained to insure the payment of losses on employers' liability policies are used to pay the losses for which such fund was reserved as they mature, and no part of the fund so reserved is released to appellant for other uses. The fact that less reserve is required in one year than in the preceding year does not mean that appellant received any income because of such decrease in the reserve required. The sum required as the reserve fund at the end of each year represents outstanding unpaid losses on employers' liability policies. Whatever was paid within the year from the reserve fund was received by third persons as payment for losses for the payment of which such fund was reserved and which had matured and become payable. Neither at the beginning, nor during, nor at the end of the year did appellant hold any part of the reserve fund freed from the restrictions placed upon it, but during all of such time appellant held all of such reserve fund as a reserve for the payment of specific losses on its employers' liability policies. In other words, the decrease in the reserve fund covering losses on employers' liability policies is not taxable, because it represents nothing; it is what it appears to be, namely, a minus quantity and not an asset, nor is it represented by money or anything else, and is, therefore, in no sense income, being merely a bookkeeping entry. The court has found this fact, as appears in finding XIV, using the following words:

> "The decrease in employers' liability loss reserve for 1913, designated as 'released reserve,' did not in any respect affect or change claimant's gross income or disbursements, as shown by the State insurance reports."

If the decrease in the reserve covering losses on employers' liability policies did not in any respect affect or change appellant's gross income, then it was in no manner income of appellant and cannot be legally taxed as income. Certainly, in order to render appellant liable to pay a tax upon assets, such assets would have to affect and change appellant's income by increasing it. In order to tax the amount of the decrease in a reserve fund such decrease in the reserve fund would have to cause an equal increase in appellant's income. The facts themselves answer conclusively in the negative appellees' claim that the amount of a decrease in reserve fund should be taxable as income of appellant, for they show that such decrease did not cause a corresponding increase in income.

The reserve fund to cover losses on employers' liability policies is not maintained intact throughout the entire year and at the expiration thereof the excess released to appellant free from restriction, in case the reserve requirement for the following year is less than that then maintained, but, on the contrary, the reserve is reduced during the year by the payment therefrom of the matured losses which it was created to secure. This results in there being at no time in the reserve fund a larger sum than is required to secure the then outstanding losses; hence, there never is any part of the reserve fund that can be released. In other words, if the outstanding, unsettled losses on employers' liability policies required a reserve of $500,000 on December 31, 1912, and of $400,000 on December 31, 1913, then the actual reserve fund maintained by appellant as required by law would be on December 31, 1912, $500,000, and on December 31, 1913, $400,000 and not $500,000. The $100,000 difference would have been used to pay that much of the $500,000 liability outstanding on December 31, 1912, and there would be nothing which could be released from the reserve fund. The term "released reserve" as used by the Government is a misnomer and appellant believes is responsible for much of the confusion that has existed regarding the taxable status of an insurance company resulting from a decrease in reserve funds.

It is not a fact, and there is no finding of fact to the effect, that the reserve funds maintained by appellant were larger than was necessary to pay the losses which they secured and that a surplus resulted from the payment of the matured claims, and any argument based upon such an assumption is without facts to support it.

Of all the reserves required by law to be maintained by appellant there is only one which is not used during the year in the payment of such claims as mature and become payable. The reserve for unearned premiums which is maintained in order that there will be a fund sufficient to reinsure appellant's outstanding risks (represented by its policies), in case of its dissolution on insolvency in some other insurance company, is not ordinarily used by appellant during the year, and in case of a decrease in the reserve so required there would result a release to appellant of funds that it could use. In determining the case which is now before the court an argument based upon a decrease in unearned premium reserves would not be in point, for the reason that the decrease which is now before the court for its consideration is a decrease in reserve covering losses on employers' liability policies, and the two reserves are not the same, the first reserve remaining intact during a full year, the last reserve to be used during the year as the losses which it secures are paid. A decrease in the reserve requirement of the first reserve would release a sum equalling such decrease; the decrease in the reserve requirement of the second reserve would release nothing.

For the above reasons it would seem clear that inasmuch as a decrease in the reserve fund required by law to be maintained to cover losses on employers' liability policies does not result in the receipt of income, appellant should not be charged with the amount of such decrease as income.

The only phase of this question so far presented to the court for consideration is, that a decrease in reserve requirement produced nothing in the form of assets, and hence resulted in nothing which could be taxed. The following reason, in no way dependent upon the preceding argument, answers in the negative, it is believed, the question as to whether a decrease in any reserve fund whatsoever produces income which is taxable.

It is fundamental that only such tax can be laid as is specified in the taxing act and that only such property is subject to tax as is specifically set forth in the taxing act. Taxing acts are strictly construed in favor of the taxpayer.

> "It is a general rule in the interpretation of all statutes levying taxes and duties upon subjects or citizens, not to extend their provisions beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy." * * * "In every case therefore of doubt such statutes are construed more strongly against the Government and in favor of the subject or citizen, because burdens are not to be imposed nor presumed to be imposed beyond what the statutes expressly and clearly import."
>
> United States *vs.* Wiggleworth, 2 Story, 369.

> " 'Keeping in mind the well-settled rule that the citizen is exempted from taxation unless the sum is imposed by clear and unequivocal language, and that where the construction of a tax law is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid * * *.' "
>
> Spreckles Sugar Refining Company *vs.* McClain, 192 U. S., 397–416; 48 L. Ed., 496–503, and other cases cited.

The act determines the property which is to be taxed under it. That property which can under the terms of the act be specifically taxed and which answers specifically to the description of taxable property as set forth in the act is taxable, and nothing else. It is the description of the property that is taxable which is contained in the act which must govern in determining whether any particular kind of property is taxable under the act. The act of October 3, 1913, contains within itself a description of the property which is taxable thereunder. Section G (*a*) of such act imposes a tax upon the entire net income of corporations arising or accruing from all sources during the year for which the tax is levied. Section G (*b*) provides that the net income so subject to taxation shall be ascertained by deducting from the gross amount of income "received within the year from all sources" certain specific deductions. Appellant has argued in the preceding sections of this brief the question now submitted as to when income must be received in order to be part of its taxable income for a given year and appellant assumes that the conclusion advanced by it, namely, that only income received within the taxing year can be taxed under the act, will be the rule adopted by the court. Appellant further assumes that the court will follow the cases of Hayes *vs.* Gauley Mountain Coal Company, *supra,* and Southern Pacific Railway Company *vs.* Lowe, *supra,* and will hold that the income of appellant which is taxable under the 1913 act for the year 1913 must have been received by it during the year 1913. The reserve funds in which a decrease must occur in order to come within the question now submitted to the court are those required by the laws of the various States and the amounts thereof are determined at the beginning of each year in accordance with the annual reports made by appellant to the various State insurance departments. In these reports, appellant is required to set up, among other things, its premiums accrued during the year and its liabilities, and in accordance with the facts as so shown is required to maintain reserve funds to cover such liabilities, including the unearned premiums on such policies.

The question here presented for consideration is a peculiar one and can best be explained by an illustration. We will assume that on December 31, 1912, appellant was required by law to maintain certain reserve funds, amounting in all to $500,000. That on December 31, 1913, appellant was required to maintain reserve funds, amounting in all to $400,000. Assuming the facts as above stated, December 31, 1913, there would be required by law of appellant reserve funds in amount $100,000 less than were required December 31, 1912. It is contended by appellee that appellant should be charged as of income with the sum of $100,000, which represents the difference between the reserve requirements of 1912 and 1913. There is only one source from which this sum could be derived and that is from the reserve fund held by appellant, December 31, 1912, and which was received by appellant prior to December 31, 1912. In other words, assuming that there was a sum of $100,000 in the reserve fund of appellant December 31, 1913, which would not be required for its reserve funds for 1913, nevertheless such fund could in no sense be taxable, for the reason that it is not income "received within the year" 1913, but was income received by appellant during the year 1912, or some preceding year, and placed by it in its reserve fund prior to January 1, 1913. There should be no confusion about this situation. All of appellant's income is included in its gross income for the year in which it is received. No part of its gross income received within the year is withheld from its account of gross income and not charged therein, but all of its income is accounted for. If the funds claimed to be taxable by the Government in a given year were not received by appellant in the year in which it is proposed to tax them, but in some other year, then such funds are not taxable in such year, under the act of October 3, 1913, and as the reserve funds which include the excess reserve, equalling the increase in reserve requirement, must have been increased by appellant in the year preceding that in which a decrease occurred, such decrease in reserve requirement could not result in additional taxable income to appellant. For these reasons the lower court erred in holding that the sum equalling a net decrease in reserve funds constituted taxable income.

In the lower court appellee advanced certain arguments, which appellant desires to analyze.

The deduction allowed by the statute is "net addition to reserve funds," and this clearly means that all of the reserve funds for a year are to be added together to determine if there is a net addition over those of the preceding year. By adding together all of the reserve funds for a given year, to determine whether there was a net addition for that year over the preceding year, a decrease in any particular reserve fund would be reflected in the total sum so obtained. This procedure has been followed by appellant and appeared in appellant's tax returns for the years 1909 to 1912, inclusive. The method followed was to find the increase in each reserve fund, then to add these increases together and deduct from such sum the decrease in any fund in which a decrease existed. At no time from 1909 to 1912, inclusive, was there a decrease in the total amount of all reserve funds maintained by appellant in any year as compared with the preceding year. At no time has appellant accepted the ruling of the Government, that in case the sum of all the reserve funds was less in one year than in the preceding year that it should be charged with the decrease as an item of income, but on the contrary, it was only because of the direction of the officials of the Government and under the ruling of the Treasury Department that appellant included such decrease in its 1913 tax return as income under the heading of "released reserve." (See Finding of Fact XIV.) Hence the claim on the part of appellee that appellant is estopped because of its practice in this regard is without foundation and that part of the lower court's opinion found on page 36 of the record reading as follows:

> "The commissioner has consistently included the total sums of released reserves within the gross income of insurance companies and subjected the sum to the excise tax. The claimant company since 1909 have accepted the ruling and made their returns accordingly. The issue is for the first time presented in the present suit,"

would seem to be without justification.

The appellee in the lower court urged that the several reserve funds required by law to be maintained by appellant consisted of sums of money which had escaped taxation because of the deduction under the law of the net addition to reserve funds. This is an erroneous conclusion that might easily be reached, but the wording of the deduction, which is, "the net addition, if any, required by law to be made within the year to reserve funds," shows that only so much of the reserve funds as represented increase over the preceding year is included in the deduction. This is a very different thing from the assumption that the entire amount of the reserve funds represented funds which had been deductions. As a matter of fact, only a small percentage of the funds required by law to be maintained by appellant as reserves are ever part of the deductions allowed by law. As has been heretofore shown, the reserve funds are continuously used to pay the losses which they secure, and this leaves a deficit in the fund equal to the losses paid, which deficit must be made up by appellant out of its current income before a net addition could arise, and none of its current income so used is allowed as a deduction. It is only when the total liabilities at the end of the year for which the reserve funds are maintained are greater than they were in the preceding year that a deduction is allowed, and then only in a sum equalling such increase.

It should always be borne in mind that the law imposed a tax upon going concerns, and that at the time the law took effect each insurance company which was doing business in the United States was required by law to maintain reserve funds. The Federal act did not allow as a deduction a sum equalling the full amount of the reserve funds required by law at the time it went into effect. Nor did it allow as a deduction any funds taken out of current income to maintain reserve funds which were depleted by the happening of the contingencies for which the reserves were maintained. In other words, if appellant's reserve funds for 1908 were $2,000,000 and during the year 1908 $1,500,000 of such reserve funds were used in paying liabilities which they secured, and the reserve funds required by law in 1909 amounted to $2,250,000, then the amount which appellant would be allowed to deduct from its gross income as net addition to reserve would be $250,000, not $1,750,000, which was the sum actually taken out of its income and placed in reserve by it for the year 1909.

And so in considering this question it should always be remembered that only the net addition to reserve funds each year fixes the amount of the deduction, and that if there is no net addition then there is no deduction, even though the reserve funds required by law are equal to those of the preceding year and have to be maintained out of current income. Each time that there is an increase in reserve funds required by law, the new amount becomes the measure of the reserve funds which must be replaced by taxable income. The deduction having been once allowed, all replacements of the net addition to reserve funds which represented the deduction are made from income which is taxed. Inasmuch as the great majority of insurance claims are paid within a year from the time they accrue and as such claims are paid out of the reserve funds maintained by the insurance company, the reserve funds of each year would, of necessity, consist of new funds taken from current income, and these funds, except in case of net addition to reserve funds for the current year, would appear in the income of appellant and would have been part of its taxable income. When, therefore, appellee urges that a decrease in reserve funds required by law releases funds which have escaped taxation, it would be incumbent upon appellee to show—first, that there had been net additions to appellant's reserve fund since the act went into effect; second, that the increase in the reserve fund since the act went into effect equaled the decrease, and third, that the increase in the reserve fund of the preceding year equaled the decrease in the reserve funds for the present year. Otherwise, it is apparent that the funds which it is claimed were released would already have been part of appellant's taxable income, and instead of escaping taxation appellant would be required to twice pay the tax on the same items of income. Therefore, that part of the opinion of the lower court appearing upon page 35 of the record, as follows: "The company receives a premium of $100; $50 of this sum must be reserved under the law to meet the contingency of reinsurance—unearned premium. While the $50 is exempted, it is none the less income," is without foundation and is error.

The appellee in the lower court urged that sums placed in the reserve funds of appellant were exempt from taxation under the law of 1913. We are unable to find any section of the law that exempts any part of appellant's income from taxation, except interest on public obligations. All of appellant's income except interest on public obligations is subject to taxation. The law provides that certain items may be deducted from appellant's income. It is not surprising that appellee should confuse the words "exemption" and "deduction." The one implies that for some particular reason certain items of income are exempted from taxation under the law and are taken out from the operation of the law; the other has nothing whatever to do with the making up of income or the determining of what items compose income, but is a charge against income which is allowed by law. In speaking of an exemption one refers to taxable property which has been excused from taxation. In speaking of a deduction, reference is made to some payment or charge that is admitted as a liability against income for the tax year; one represents income, the other represents outgo. In the case of an exemption it might be said that income which escaped taxation because exempted should, when the status of the item no longer complied with the description of the exemption, again become income. The case of a deduction is different. A deduction has no status. When it is allowed and the deduction is taken from income the transaction is closed. Moreover, such an item as net addition to reserve funds could not subsequently change. It is a mathematical result. The amount of the net addition to reserve funds for any one year over another becomes fixed as soon as the reserve requirements for the two years are determined, and does not change. The same is true of all deductions. They are fixed sums and are not subject to change in status. It cannot, therefore, be said that a deduction escapes taxation, because a deduction is never income. Congress could have made the income used in the net additions to reserve funds exempt from taxation so long as such income continued to be used as a reserve fund, if it had so desired to do, and in that case, when the income ceased to be used as reserve funds, it would be taxable under the law, but Congress did not make income exempt during its use as net addition to reserve funds, but, on the contrary, allowed a straight, unqualified and unrestricted deduction equaling such net addition. Further, it is not claimed by appellee that only such funds as have been deducted from the gross income of appellant during the operation of the taxing act became income upon their being released from the reserve requirement, but it is claimed that all funds released from the reserve requirement become income, no matter from what source they were originally derived. The act does not tax accumulations made prior to the taking effect of the act, and hence it could not have been the intention of Congress to tax the sum representing a decrease in reserve funds occurring during the first year of the act, for the reason that if there was a release of reserve funds in such year it would be made up of funds accumulated prior to the taking effect of the act. This same condition would continue so long as there was no net addition to reserve funds and would continue in part so long as the net addition to reserve funds did not equal the decrease in reserve funds. Congress could have provided for the taxation of that part of the net addition to reserve funds which it allowed to be deducted from income upon there being a decrease in reserve funds equal to or less than such addition if it had so desired, but it did not do so, and the court will not read into the act a clause which is not included therein.

> "But if Congress had desired to grant such authority, it would have been easy to have said so in express terms; and because it did not say so, we are led irresistibly to the conclusion that it did not intend to give any such power."
>
> Tillson *vs.* United States, 100 U. S., 46.

The making of a decrease in reserve funds liable to taxation would require the addition of a complicated clause to the statute, which, if equitable, should include all of the exceptions which arise in case the funds in the reserve fund, or any part thereof, had been accumulated prior to the taking effect of the act. It will therefore be seen, first, that a deduction does not represent income that has escaped taxation; second, that it was not the intention of Congress to tax sums accumulated prior to the taking effect of the act, and as a decrease in the reserve funds could not be taxed without a determination as to whether the funds so released were accumulated prior to the taking effect of the act, no provision to tax a decrease will be read into the act.

(L.) Under the act of August 5, 1909, was appellant, after the passage of the Pennsylvania act of June 1, 1911 (P. L., 607), entitled to include in its reserve funds required by law reserve funds against unpaid losses on policies other than employers' liability policies? If so, should the total amount of reserves required by law for unpaid losses on policies other than employers' liability policies be added to reserve funds for the year 1911, inasmuch as there was no such reserve fund required by law for the year 1910? It is unnecessary to consider the above query, if queries (G), (H), (I), and (J) are decided in accordance with the claim of appellant.

The lower court in its opinion delivered January 12, 1917, decided as a matter of law that for 1911, 1912, and 1913 appellant was entitled to include in its reserve funds required by law a reserve for losses on policies other than employers' liability policies. The exact wording of the court's opinion is as follows:

> "Loss and unpaid liability claims form an exact basis for computation and the reserves maintained covering the liability therefor. The State statutes most generally require the maintenance of a reserve to cover each class of this particular kind of insurance, * * *."

The decision of the court so rendered is in accordance with the holding of this court in the case of McCoach *vs.* Insurance Company of North America, *supra,* and is in accordance with the present practice of the Treasury Department. It is, therefore, difficult for appellant to understand why the court did not under its own decision find a judgment for plaintiff in the sum of the total amount of net addition to reserve funds arising from the net additions made by appellant to its reserve funds for losses on policies other than employers' liability policies. The lower court seems to have become absorbed in the question of the amount of premiums collected by appellant's agents and the dates on which they were collected, to the exclusion of every other fact and question in the case. Upon the failure of appellant to produce evidence from each and every one of its agents in each and every of the States and Territories of the United States, showing the amounts of premiums collected by each and every of such agents during the years in question in this suit (which it was manifestly impossible for appellant to do), the lower court apparently came to the conclusion that it would deny to appellant relief on that count or claim which the court held required such evidence and that it also would, for the same reason, deny appellant's claims as to all other questions in this suit, although such evidence had no bearing on such claims. The fact that appellant failed in its proof as to one count or claim in its petition would not be ground for denying relief to appellant on every other count or ground alleged in its petition. If in reviewing this case the Supreme Court should decide against appellant as to every other point raised, nevertheless it would seem that the case would have to be reversed, with a direction that appellant would be entitled to a judgment for a tax equaling 1 per cent of the amount of net addition to its reserve funds for losses arising on policies other than employers' liability policies for the years 1911 and 1912.

In considering what is the net addition to reserve funds required by law for the year 1911, the total amount of reserve funds required by law for claims on losses on policies other than employers' liability policies for such year would have to be considered, as this would be the sum which would be added to the other reserve funds in order to find the total reserve funds required by law for 1911. This statement would hardly be necessary if the Treasury Department had not in its practice claimed that the only sum which it would allow as a net addition to reserve funds for losses on policies other than employers' liability policies for 1911 would be limited to the difference between the reserve fund which the Department insists appeliant carried for this purpose voluntarily in 1910 and the reserve required under the Pennsylvania statute in 1911. Of course, the statement of the claim contains the answer. The total of the reserve funds required by law in 1910 would not include any sums reserved for losses on policies other than employers' liability policies, as such reserves were not required in 1910, as held by the lower court, and the reserve funds for 1911 would include such funds, so that the net addition to reserve funds for 1911 would include all of the reserve maintained for losses on policies other than employers' liability policies. It is therefore submitted that in case this court holds that "reserve funds required by law" did not, during the years 1909 and 1910, include reserve funds covering losses on policies other than employers' liability policies, then that under the Pennsylvania act of 1911 reserves for such losses were required by law, and for the year 1911 the entire reserve so maintained would be included in the net addition required by law to be made to reserve funds for 1911.

(M.) Under the act of October 3, 1913, was appellant, under the Pennsylvania act of June 1, 1911 (P. L., 607), entitled to include in its reserve funds required by law reserve funds against unpaid losses on policies other than unpaid employers' liability policies? It is unnecessary to consider the above query, if queries (G), (H), (I), and (J) are decided in accordance with the claims of appellant. The same argument applies as was made under the preceding query, and no further argument is presented.

(N.) What application, if any, do sections 3226, 3227, and 3228 of the Revised Statutes and the second proviso of section 14 of the act of September 8, 1916 (38 Stat. L., 772), have to the several items comprising the claims of appellant in this suit?

All of said sections and proviso contain the provisions under which appellant may maintain suit in the Court of Claims for amounts which it claims were wrongfully paid by it to the Government as taxes, and the material provisions of such sections and proviso are as follows:

Section 3226: "No suit shall be maintained * * *, until appeal shall have been duly made to the Commissioner of Internal Revenue * * * and a decision * * * had therein; provided that if such decision is delayed more than six months from the date of such appeal, then said suit may be brought * * * within the period limited in the next section."

Section 3227: "No suit * * *, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued * * *."

Section 3228: "All claims for the refunding of any internal tax * * * must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued."

Second proviso, section 14 of act of September 8, 1916 (39 Stat. L., 772): "That upon the examination of any return of income made pursuant to this title, the act of August 5, 1909, * * * if it shall appear that amounts of tax have been paid in excess of those properly due, the taxpayer shall be permitted to present a claim for refund thereof, notwithstanding the provisions of section 3228 of the Revised Statutes."

Suit was instituted herein February 8, 1916, and the question arises, first, whether any of the claims made against the Government were barred by the limitations set forth in the sections above referred to, and, second, whether the act of September 8, 1916, did remove any bar that might have existed under such sections. June 8, 1910, appellant paid a tax under the 1909 act, amounting to $2,783.20. February 27, 1913, the commissioner reassessed appellant for its 1909 tax under the excise tax law, basing such reassessment upon an amended return filed by the commissioner. The entire tax of appellant was recomputed and the commissioner gave credit to appellant for the tax theretofore paid. Appellant requested an abatement of the tax so assessed, and after consideration of such claim made by appellant the tax was remitted in the sum of $8,771.43. August 14, 1914, that is, within two years from the reassessment of appellant's tax of the year 1909, which was finally paid November 13, 1913, appellant filed a claim for refund of the additional tax collected for 1909, and April 30, 1915, within two years from the date of the completion of the assessment against appellant for the 1909 tax, appellant filed a claim for refund for the entire tax payment for 1909. Both of these claims for refund, subsequent to the institution of this suit, were rejected by the Commissioner of Internal Revenue, that is, more than six months after they were filed with him.

June 27, 1911, appellant paid a tax assessed against it for the year 1910, amounting to $2,212.11. October 30, 1913, the commissioner reassessed appellant's tax for 1910, upon which reassessment credit was given for the tax theretofore paid, leaving a sum still due of $1,191.64, which was paid August 11, 1914. August 14, 1914, appellant filed a claim for the refund of the additional tax paid for the year 1910, and on April 30, 1915, filed a claim for refund of all taxes paid for the year 1910.

June 29, 1912, appellant paid its tax for the year 1911, amounting to $2,644.45, and October 30, 1913, the commissioner reassessed appellant's tax for the year 1911, such reassessment being based upon an amended return filed by the commissioner and the commissioner credited on the tax so reassessed against appellant the tax already paid by appellant for the year 1911, which left an additional sum due as tax for the year 1911 of $2,613.50, which appellant paid August 11, 1914. August 14, 1914, appellant filed a claim for the refund of the additional tax paid by it for the year 1911, and April 30, 1915, filed a claim for refund for all tax payments made by it for the year 1911.

As the original tax upon appellant's business for the year

1912 was assessed June 10, 1913, and as such assessment and payment was within the time prescribed by any of the provisions of the statutes limiting the time within which appellant could bring suit, it is not necessary to set up the reassessment made or the refunding claims filed, and this is equally true for the year 1913.

Assessments were made for the years 1909, 1910, and 1911, in the years 1910, 1911, and 1912, respectively, and if the claim of appellant is for taxes collected on the assessments made in the years 1910, 1911, and 1912, then, as is readily seen from the statement of facts above made, no claims for refunds were filed with the Commissioner of Internal Revenue asking for the return of the taxes so assessed and paid within the time provided in the statutes. This has been the contention of the Government since this suit was instituted, but was not the contention of the Government at the time of the reassessment of the taxes for the years 1909 to 1913, inclusive, and it is that which was done at the time of the reassessment of the taxes which will control as to the existing situation. The Commissioner of Internal Revenue, in reassessing the taxes for 1909 to 1913, inclusive, disregarded and paid no attention to the first assessment made in each of these years. He did not use the same principles for determining the tax upon the reassessment as were used in the first assessment, and arrived at an entirely different result. His first assessment was based upon income received within the year. His second assessment was based upon income accrued within the year. He did not correct or modify the old assessment, but made a new assessment and gave credit to plaintiff on the new assessment for the tax paid on the old assessment. Under these circumstances the second assessment was a new assessment, requiring a new claim to be filed for refund, under the case of

Cheatham *et al. vs.* United States, 92 U. S., 85.

In this case there was one assessment and later there was a second assessment or reassessment and the court held:

> "1. The assessment on which this money was paid was a different assessment from the one upon which the appeal to the commissioner was taken. That assessment was wholly set aside. The matter was referred to the local assessor, with directions to make a new assessment. The rules, by which this new assessment was to be made, were prescribed for him and differed materially from those which governed the first assessment. The commissioner did not pretend to modify the original, or to reduce it and let it stand as so modified or reduced. He did not even fix the amount to be assessed. It was an entirely new and distinct assessment, based on different principles, which resulted in a sum not one third as large as the assessment which had been set aside. From this assessment, plaintiffs had an undoubted right to appeal to the commissioner and urge any of the reasons which they now rely on, to show that it was illegal. They paid it without such appeal; and, in doing so, we think they come within the provisions of the section which forbids suit, unless an appeal has been taken."

It therefore follows that as claims for refunds of the taxes assessed and paid at the time of the reassessment for the year 1909 to 1912, inclusive, were filed within two years from the time such taxes were paid, that the sections of the statute above referred to had no application to such payment, and appellant can recover the full amount of the taxes assessed at the time of such reassessment if otherwise legally entitled so to do.

Appellee claimed in the lower court that the filing of a request for the abatement of the 1909 tax, which was assessed February 27, 1913, and prior to the payment thereof, operated as an appeal to the commissioner and barred claimant from filing a refunding claim after payment of the tax and that from the time such abatement claim was decided the statutes of limitations ran against appellant. If the above contention of the appellant is correct then the two-year statute of limitation would have become effective as a bar November 13, 1915, and as this suit was not instituted until February 8, 1916, no claim could have been filed by appellant for a refund of the 1909 tax. The claim of the Government is based upon the case of

De Barry *vs.* Dunne, 162 Fed., 961,

and similar cases which have held, and appellant believes rightly held, that where an abatement claim has been filed and denied by the Commissioner, then the filing of a refunding claim is not necessary on the part of claimant in order to perfect claimant's right to sue, the theory being that the Commissioner of Internal Revenue having once fully considered and rejected the claim there is no necessity of reduplicating the work and requiring another decision, inasmuch as the law does not require the doing of idle acts. These decisions do not, however, go to the extent of holding that a request for the abatement of a tax not yet paid is the same thing as a claim for the refund of a tax already paid, nor do they hold that the abatement claim takes the place of the refund claim under the statutes. The Supreme Court has often held that sections 3226, 3227, and 3228, provide the method which shall be followed for the recovery of tax payments, and section 3228 provides for the filing of claims for the refunding of taxes, and when appellant follows the steps indicated by the statutes it has done all that it is required to do. It had a right to file its abatement claim, and if it had so desired it might have sued the Government upon the disallowance of such claim and payment of the tax. It had the right, after the disallowance of its abatement claim, to file a claim for the refunding of the same taxes and if it desired to present the matter again to the Commissioner of Internal Revenue for his decision, in the hope that the claim might be settled without litigation, it was within its rights in so doing, and the statute of limitations did not start operating until after a decision was rendered by the Commissioner of Internal Revenue thereon. The fact that two rights existed does not necessarily mean that one excludes the other. This is well illustrated in the statutes which we now have under consideration. If, in the present case, the Commissioner of Internal Revenue had delayed rendering his decision for a period of six months after the claim was filed with him, then claimant could institute suit providing it did so within the period of two years. If claimant did not institute its suit within two years, then it could not institute suit until after the commissioner rendered a decision on the claim, but the fact that it did not institute its suit within two years after the six months' period would not bar claimant from instituting its suit within two years after the Commissioner of Internal Revenue rendered his decision.

Stewart *vs.* Barnes, 153 U. S., 456.

Two rights existed as to when claimant could institute its suit, and the failure to exercise one of the rights did not bar claimant's right to exercise the other right. The same rule applies, and although appellant could have instituted suit upon the commissioner's passing upon the abatement claim and the payment of the tax, nevertheless, its failure to institute suit did not bar claimant's right to file its refunding claim and institute its suit within two years thereafter. The cases are analogous.

For the above reasons it will be seen that none of the statutes of limitations apply to the claims made by appellant in its suit for recovery for taxes illegally collected.

After the institution of suit by appellant February 8, 1916, Congress passed the act of September 8, 1916. The second proviso of section 14 thereof removed the bar to the filing of claims for refunds of taxes wrongfully paid, which had been operative under section 3228 of the Revised Statutes of the United States, and under which no claim for a refund for taxes illegally paid could be filed with the commissioner after the expiration of two years next after the cause of action accrued. Under this section of the 1916 law claims for refunds which had accrued more than two years prior to the time of filing with the Commissioner of Internal Revenue would be considered by the Commissioner of Internal Revenue, and in case of non-action or adverse action the claimant could institute suit under sections 3226 and 3227 of the Revised Statutes. The power of Congress to remove the bar imposed by a statute limiting the time within which a claim could be filed is recognized by the decisions of this court. In the case of

Campbell *vs.* Holt, 115 U. S., 620,

the court held:

> "We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted, and especially by this court, are founded in public needs and public policy—are arbitrary enactments by the law-making power. Tioga R. R. Co. *vs.* Blossburg R. R. Co., 20 Wall., 150 (87 U. S. bk., 22, L. Ed., 337). And other statutes, shortening the period or making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete. The right does not enter into or become a part of the contract. No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says, time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost."

In the recent case of

> William H. Sage *et al.* *vs.* United States, Adv. Ops., Lawyers' Co-operative Pub. Co., No. 15, p. 515,

this court decided a question somewhat similar to that here presented, arising under the act of June 13, 1898, and chapter 256 of the acts of the 62d Congress, 37 Stat. L., 240, which last-mentioned act extended the time within which claims under the war revenue tax act might be filed with the Commissioner of Internal Revenue. The tax was collected in June, 1903, and a claim for refund was filed August 24, 1903. No further claim for refund was filed. The material parts of chapter 256 read as follows:

> "That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under * * * the war revenue (act) * * * may be presented to the Commissioner of Internal Revenue on or before the first day of January, 1914, and not thereafter.
>
> "Section 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States Treasury not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, * * * any sums paid by them."

Suit was instituted January 23, 1917, which was three years after the time limit fixed in the statute. The first section of this act is not materially different from the second proviso of section 14, now under consideration. It is true that there is no such provision contained in the second proviso of section 14 as is contained in section 2 of chapter 256, and that this court in construing chapter 256 placed considerable weight upon the fact that in section 2 of such chapter an appropriation was made for such claimants "as have presented" their claims. Nevertheless, the reasoning underlying the construction placed upon chapter 256 by the court will apply to the construction of the proviso now under consideration. The purpose in having the claim presented to the Commissioner of Internal Revenue before suit is brought is not to cause delay in bringing suit, but is to get an adjudication upon the merits of the claim, and this, when it has been obtained, is all that the statute requires. To use the language of this court:

> "The claim was presented to the Commissioner of Internal Revenue to get the money. The suit was only the undesired alternative in case the Commissioner rejected the claim. It plays no part in the question that we are now considering. Suppose that no suit had been brought, we can see no ground for denying that the claim would have been presented within the meaning of the act. It did not have to be a claim under the act; as the statute in terms contemplated that it might have been presented before the suit was brought, it is sufficient now. The statute, of course, does not confine its act of justice to unrejected claims." Sage *et al.* *vs.* United States, *supra,* 517.

In the present case the claims were presented to the commissioner to get the money and were passed upon by him upon the merits. The action that would be taken by the commissioner upon refiling of the claims is not in doubt and nothing could be gained by a refiling thereof. No rights of the defendants are prejudiced, as they have been fully informed as to all the facts upon which appellant's claims are based. The law never requires useless acts to be done. Section 3228 provides that claims shall be filed with the commissioner within two years next after the action accrues. The action for the purpose of this section accrues upon the payment of the taxes. Nevertheless, where an abatement claim is filed with the commissioner prior to the payment of the tax and is rejected on the merits by him before payment, it is held unnecessary to file an additional claim for refund. The refiling of such a claim would be useless unless new arguments were presented for consideration. De Barry *vs.* Dunne, *supra.*

The refiling of claims already filed would be as useless under proviso two of section 14, as under section 3228.

This court has always held that useless acts and the causes of unnecessary and vexatious delays be done away with and the performance thereof considered unnecessary. One of the recent decisions of this court applying this salutary doctrine is:

Dodge *vs.* Brady, 240 U. S., 122-125.

A somewhat similar question to that now under consideration was presented in the Dodge case under section 3226 of the Revised Statutes, the facts in the Dodge case being that a bill had been filed to enjoin the collection of taxes accruing under the act of October 3, 1913. Later, and before the hearing, a supplemental bill was filed alleging that plaintiff had filed a protest with the Commissioner of Internal Revenue against payment of the taxes and that the commissioner had, prior to the payment of the taxes, decided adversely to the claims made by the plaintiff in its protest, and that thereupon plaintiff had paid the taxes. The plaintiff admitted that it had no right to ask for an injunction, and claimed that under the supplemental bill its suit could be considered a suit for the recovery of taxes unlawfully paid. The defendants maintained that the supplementary bill could not be considered as a suit to recover taxes, because sections 3226, 3227 and 3228 of the Revised Statutes had not been complied with prior to the institution of the suit. The filing of the protest by the plaintiff with the Commissioner of Internal Revenue was in effect an abatement claim filed after suit was instituted. This court held, page 125:

> "And it is argued by the government that there was no jurisdiction under the supplemental bill, since it fails to allege that an appeal was taken to the Com-

> missioner of Internal Revenue after the payment of the taxes, and that he refused to refund them, and therefore fails to allege a compliance with the conditions imposed by sections 3220 and 3226 of the Revised Statutes (Comp. Stat., 1913, sec. 5949), as prerequisites to a suit to recover taxes wrongfully collected. But, broadly considering the whole situation, and taking into view the peculiar facts of the case, the protest to the commissioner, and his exertion of authority over it, and his adverse ruling upon the merits of the tax, thereby passing upon every question which he would be called upon to decide on an appeal for a refunding of the taxes paid, we think that this case is so exceptional in character as not to justify us in holding that reversible error was committed by the court below in passing upon the case upon its merits, thus putting an end to further absolutely useless and unnecessary controversy."

The law does not require the doing of useless acts, and as the claims of appellant for refunds had been filed with the commissioner prior to the institution of suit and were later considered by him, even if they had not been filed within the period provided in section 3228, nevertheless the second proviso of section 14 of the act of September 8, 1916, would operate as the removal of any bar, and the lower court did not err in considering appellant's suit on the merits.

Conclusion.

It is therefore respectfully submitted that the decision of the lower court should be reversed with directions to compute judgment for appellant in accordance with the following principles:

1. Only items received within the year shall be treated as income for that year under both the act of 1909 and the act of 1913.

2. Items of income which accrued prior to the taking effect of the taxing act and which were received after the taking effect of the act, shall not be included in taxable income under either the act of 1909 or under the act of 1913.

3. Income received by agents for collection and remittance shall not be charged to the principal until received by the principal.

4. Reserve funds required to be maintained by the State insurance departments of New York and Wisconsin are reserve funds required to be maintained by law, and the net addition required to be made thereto in any year is a proper deduction under the second deduction in subdivision 2 of section 38 of the act of August 5, 1909, and under the second deduction provided for in section 2, subdivision G (*b*) of the act of October 3, 1913.

5. A decrease in reserve funds required by law in one year, as compared with the preceding year, does not result in additional income, and the amount of such decrease shall not be charged as income.

6. In reassessing the taxes for the years 1909, 1910, and 1911, the Commissioner of Internal Revenue made a different assessment from the first assessment, and the time within which a claim for refund could be filed with the commissioner for refund on the whole of the tax so assessed commenced to run from the date of the payment of taxes made on such reassessment. The filing of a request for the abatement of a tax prior to the payment thereof is not equivalent to the filing of a claim for the refund of a tax paid and does not prevent the filing of a claim for refund, and the provisions of section 3228 do not operate from the determination of such claim for abatement. Sections 3226, 3227, and 3228 of the Revised Statutes do not operate as a bar to the claims presented in this case.

7. The second proviso of section 14 of the act of September 8, 1916, operated as a removal of any bar that might have existed by reason of sections 3226, 3227, and 3228 of the Revised Statutes.

Respectfully submitted,

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APPENDIX.

Section 38 of the Act of August 5, 1909 (36 Stat. L. 112-117).

SEC. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska, or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided, however,* That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided,* That in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, (first) all the ordinary and necessary expenses actually paid within the year out of earnings in the maintenance and operation of its business and property within the United States and its Territories, Alaska, and the District of Columbia, including all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year in business conducted by it within the United States or its Territories, Alaska, or the District of Columbia not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness, not exceeding the proportion of its paid-up capital stock outstanding at the close of the year which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia bears to the gross amount of its income derived from all sources within and without the United States; (fourth) the sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, and insurance companies, subject to the tax hereby imposed. In the case of assessment insurance companies the actual deposit of sums with State or Territorial officers, pursuant to law as additions to guaranty or reserve funds shall be treated as being payments required by law to reserve funds.

Third. There shall be deducted from the amount of the net income of each of such corporations, joint stock companies or associations, or insurance companies, ascertained as provided in the foregoing paragraphs of this section, the sum of five thousand dollars, and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company, for the year ending December thirty-first, nineteen hundred and nine, and for each calendar year thereafter; and on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations, joint stock companies or associations, and insurance companies, subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company, has its principal place of business, or, in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, in the place where its principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth, (first) the total amount of the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation, joint stock company or association, or insurance company at the close of the year; (third) the gross amount of the income of such corporation, joint stock company or association, or insurance company, received during such year from all sources, and if organized under the laws of a foreign country the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia; also the amount received by such corporation, joint stock company or association, or insurance company, within the year, by way of dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such corporation, joint stock company or association, or insurance company, within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property, and if organized under the laws of a foreign country the amount so paid in the maintenance and operation of its business within the United States and its Territories, Alaska, and the District of Columbia; (fifth) the total amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; and in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, all losses actually sustained by it during the year in business conducted by it within the United States or its

Territories, Alaska, and the District of Columbia, not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve fund; (sixth) the amount of interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, stating separately all interest paid by it within the year on deposits; or in case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, bears to the gross amount of its income derived from all sources within and without the United States; (seventh) the amount paid by it within the year for taxes imposed under the authority of the United States or any State or Territory thereof, and separately the amount so paid by it for taxes imposed by the government of any foreign country as a condition to carrying on business therein; (eighth) the net income of such corporation, joint stock company or association, or insurance company, after making the deductions in this section authorized. All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue.

Fourth. Whenever evidence shall be produced before the Commissioner of Internal Revenue which in the opinion of the commissioner justifies the belief that the return made by any corporation, joint stock company or association, or insurance company, is incorrect, or whenever any collector shall report to the Commissioner of Internal Revenue that any corporation, joint stock company or association, or insurance company, has failed to make a return as required by law, the Commissioner of Internal Revenue may require from the corporation, joint stock company, or association, or insurance company making such return, such further information with reference to its capital, income, losses, and expenditures as he may deem expedient; and the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of such return or for the purpose of making a return where none has been made, is hereby authorized, by any regularly appointed revenue agent specially designated by him for that purpose, to examine any books and papers bearing upon the matters required to be included in the return of such corporation, joint stock company or association, or insurance company, and to require the attendance of any officer or employee of such corporation, joint stock company or association, or insurance company, and to take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person; and the Commissioner of Internal Revenue may also invoke the aid of any court of the United States having jurisdiction to require the attendance of such officers or employees and the production of such books and papers. Upon the information so acquired the Commissioner of Internal Revenue may amend any return or make a return where none has been made. All proceedings taken by the Commissioner of Internal Revenue under the provisions of this section shall be subject to the approval of the Secretary of the Treasury.

Fifth. All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon;

and in case of any return made with false or fraudulent intent, he shall add one hundred per centum of such tax, and in case of a refusal or neglect to make a return or to verify the same as aforesaid he shall add fifty per centum of such tax. In case of neglect occasioned by the sickness or absence of an officer of such corporation, joint stock company or association, or insurance company, required to make said return, or for other sufficient reason, the collector may allow such further time for making and delivering such return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall be collected at the same time and in the same manner as the tax originally assessed unless the refusal, neglect, or falsity is discovered after the date for payment of said taxes, in which case the amount so added shall be paid by the delinquent corporation, joint stock company or association, or insurance company, immediately upon notice given by the collector. All assessments shall be made and the several corporations, joint stock companies or associations, or insurance companies, shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as above provided for, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint stock company, or association, or insurance company immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due.

Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received, evidence taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provisions shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court.

Eighth. If any of the corporations, joint stock companies or associations, or insurance companies, aforesaid, shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such corporation, joint stock company or association, or insurance company, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars.

Any person authorized by law to make, render, sign, or verify, any return who makes any false or fraudulent return, or statement, with intent to defeat or evade the assessment required by this section to be made, shall be guilty of a misdemeanor, and shall be fined not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

All laws relating to the collection, remission, and refund of internal-revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section.

Jurisdiction is hereby conferred upon the circuit and district courts of the United States for the district within which any person summoned under this section to appear to testify or to produce books, as aforesaid, shall reside, to compel such attendance, production of books, and testimony by appropriate process.

Act of October 3, 1913 (38 Stat. L., 172-177; 201-202).

G. (*a*) That the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships; but if organized, authorized, or existing under the laws of any foreign country, then upon the amount of net income accruing from business transacted and capital invested within the United States during such year: *Provided, however,* That nothing in this section shall apply to labor, agricultural, or horticultural organizations, or to mutual saving banks not having a capital of stock represented by shares, or to fraternal beneficiary societies, orders, or associations operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations and dependents of such members, nor to domestic building and loan associations, nor to cemetery companies, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual, nor to business leagues, nor to chambers of commerce or boards of trade, not organized for profit or no part of the net income of which inures to the benefit of the private stockholder or individual; nor to any civic league or organization not organized for profit, but operated exclusively for the promotion of social welfare: *Provided further,* That there shall not be taxed under this section any income derived from any public utility or from the exercise of any essential governmental function accruing to any State, Territory, or the District of Columbia, or any political subdivision of a State, Territory, or the District of Columbia, nor any income accruing to the government of the Philippine Islands or Porto Rico, or of any political subdivision of the Philippine Islands or Porto Rico: *Provided,* That whenever any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, has, prior to the passage of this Act, entered in good faith into a contract with any person or corporation, the object and purpose of which is to acquire, construct, operate or maintain a public utility, no tax shall be levied under the provisions of this act upon the income derived from the operation of such public utility, so far as the payment thereof will impose a loss or burden upon such State, Territory, or the District of Columbia, or a political subdivision of a State or Territory; but this provision is not intended to confer upon such person or corporation any financial gain or exemption or to relieve such person or corporation from the payment of a tax as provided for in this section upon the part or portion of the said income to which such person or corporation shall be entitled under such contract.

(*b*) Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals or other payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear and tear of property, if any; and in the case of mines a reasonable allowance for depletion of ores and all other natural deposits, not to exceed 5 per centum of the gross value at the mine of the output for the year for which the computation is made; and in case of insurance companies the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts: *Provided,* That mutual fire insurance companies requiring their members to make premium deposits to provide for losses and expenses shall not return as income any portion of the premium deposits returned to their policyholders, but shall return as taxable income all income received by them from all other sources plus such portions of the premium deposits as are retained by the companies for purposes other than the payment of losses and expenses and reinsurance reserves: *Provided further,* That mutual marine insurance companies shall include in their return of gross income gross premiums collected and received by them less amounts paid for reinsurance, but shall be entitled to include in deductions from gross income amounts repaid to policyholders on account of premiums previously paid by them and interest paid upon such amounts between the ascertainment thereof and the payment thereof, and life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder within such year; (third) the amount of interest accrued and paid within the year on its indebtedness to an amount of such indebtedness not exceeding one-half of the sum of its interest-bearing indebtedness and its paid-up capital stock outstanding at the close of the year, or if no capital stock, the amount of interest paid within the year on an amount of its indebtedness not exceeding the amount of capital employed in the business at the close of the year: *Provided,* That in case of indebtedness wholly secured by collateral the subject of sale in ordinary business of such corporation, joint stock company, or association, the total interest secured and paid by such company, corporation, or association within the year on any such indebtedness may be deducted as a part of its expense of doing business: *Provided, further,* That in the case of bonds or other indebtedness, which have been issued with a guaranty that the interest payable thereon shall be free from taxation, no deduction for the payment of the tax herein imposed shall be allowed; and in the case of a bank, banking association, loan, or trust company, interest paid within the year on deposits or on moneys received for investment and secured by interest-bearing certificates of indebtedness issued by such bank, banking association, loan or trust company; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the Government of any foreign country: *Provided,* That in the case of a corporation, joint-stock company or association, or insurance company, organized, authorized, or existing under the laws of any foreign country, such net income shall be ascertained by deducting from the gross amount of its income accrued within the year from business transacted and capital invested within the United States, (first) all the ordinary and necessary expenses actually paid within the year out of earnings in the maintenance and operation of its business and property within the United States, including rentals or other payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year in business conducted by it within the United States and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear, and tear of property, if any, and in the case of mines a reasonable allowance for depletion of ores and all other natural deposits, not to exceed 5 per centum of the gross value at the mine of the output for the year for which the computation is made; and in case of insurance companies the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts: *Provided further*, That mutual fire insurance companies requiring their members to make premium deposits to provide for losses and expenses shall not return as income any portion of the premium deposits returned to their poliyholders, but shall return as taxable income all income received by them from all other sources plus such portions of the premium deposits as are retained by the companies for purposes other than the payment of losses and expenses and reinsurance reserves: *Provided further*, That mutual marine insurance companies shall include in their return of gross income gross premiums collected and received by them less amounts paid for reinsurance, but shall be entitled to include in deductions from gross income amounts repaid to policyholders on account of premiums previously paid by them, and interest paid upon such amounts between the ascertainment thereof and the payment thereof and life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year; (third) the amount of interest accrued and paid within the year on its indebtedness to an amount of such indebtedness not exceeding the proportion of one-half of the sum of its interest-bearing indebtedness and its paid-up capital stock outstanding at the close of the year, or if no capital stock, the capital employed in the business at the close of the year which the gross amount of its income for the year from business transacted and capital invested within the United States bears to gross amount of its income derived from all sources within and without the United States; *Provided,* That in the case of bonds or other indebtedness which have been issued with a guaranty that the interest payable thereon shall be free from taxation, no deduction for the payment of the tax herein imposed shall be allowed; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof or the District of Columbia. In the case of assessment insurance companies, whether domestic or foreign, the actual deposit of sums with State or Territorial officers, pursuant to law, as additions to guarantee or reserve funds shall be treated as being payments required by law to reserve funds.

(*c*) The tax herein imposed shall be computed upon its entire net income accrued within each preceding calendar year ending December thirty-first. *Provided, however,* That for the year ending December thirty-first, nineteen hundred and thirteen, said tax shall be imposed upon its entire net income accrued within that portion of said year from March first to December thirty-first, both dates inclusive, to be ascertained by taking five-sixths of its entire net income for said calendar year: *Provided further,* That any corporation, joint-stock company or association, or insurance company subject to this tax may designate the last day of any month in the year as the day of the closing of its fiscal year and shall be entitled to have the tax payable by it computed upon the basis of the net income ascertained as herein provided for the year ending on the day so designated in the year preceding the date of assessment instead of upon the basis of the net income for the calendar year preceding the date of assessment; and it shall give notice of the day it has thus designated as the closing of its fiscal year to the collector of the district in which its principal business office is located at any time not less than thirty days prior to the date upon which its annual return shall be filed. All corporations, joint-stock companies or associations, and insurance companies subject to the tax herein imposed, computing taxes upon the income of the calendar year, shall, on or before the first day of March, nineteen hundred and fourteen, and the first day of March in each year thereafter, and all corporations, joint-stock companies or associations, and insurance companies, computing taxes upon the income of a fiscal year which it may designate in the manner hereinbefore provided, shall render a like return within sixty days after the close of its said fiscal year, and within sixty days after the close of its fiscal year in each year thereafter, or in the case of a corporation, joint-stock company or association, or insurance company, organized or existing under the laws of a foreign country, in the place where its principal business is located within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, shall render a true and accurate return under oath or affirmation of its president, vice president, or other principal officer, and its treasurer or assistant treasurer, to the collector of internal revenue for the district in which it has its principal place of business, setting forth (first) the total amount of its paid-up capital stock outstanding, or if no capital stock, its capital employed in business, at the close of the year; (second) the total amount of its bonded and other indebtedness at the close of the year; (third) the gross amount of its income, received during such year from all sources, and if organized under the laws of a foreign country the gross amount of its income received within the year from business transacted and capital invested within the United States; (fourth) the total amount of all its ordinary and necessary expenses paid out of earnings in the maintenance and operation of the business and properties of such corporation, joint-stock company or association, or insurance company within the year, stating separately all rentals or other payments required to be made as a condition to the continued use or possession of property, and if organized under the laws of a foreign country the amount so paid in the maintenance and operation of its business within the United States; (fifth) the total amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in case of insurance companies the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts: *Provided further,* That mutual fire insurance companies requiring their members to make premium deposits to provide for losses and expenses shall not return as income any portion of the premium deposits returned to their policyholders, but shall return as taxable income all income received by them from all other sources plus such portions of the premium deposits as are retained by the companies for purposes other than the payment of losses and expenses and reinsurance reserves: *Provided further,* That mutual marine insurance companies shall include in their return of gross income gross premiums collected and received by them less amounts paid for reinsurance, but shall be entitled to include in deductions from gross income amounts repaid to policyholders on account of premiums previously paid by them, and interest paid upon such amounts between the ascertainment thereof and the payment thereof, and life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year; and in case of a corporation, joint-stock company or association, or insurance company, organized under the laws of a foreign country, all losses actually sustained by it during the year in business conducted by it within the United States, not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in case of insurance companies the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts: *Provided further,* That mutual fire insurance companies requiring their members to make premium deposits to provide for losses and expenses shall not return as income any portion of the premium deposits returned to their policyholders, but shall return as taxable income all income received by them from all other sources plus such portions of the premium deposits as are retained by the companies for purposes other than the payment of losses and expenses and reinsurance reserves: *Provided further,* That mutual marine insurance companies shall include in their return of gross income gross premiums collected and received by them less amounts paid for reinsurance, but shall be entitled to include in deductions from gross income amounts repaid to policyholders on account of premiums previously paid by them and interest paid upon such amounts between the ascertainment thereof and the payment thereof and life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year; (sixth) the amount of interest accrued and paid within the year on its bonded or other indebtedness not exceeding one-half of the sum of its interest-bearing indebtedness and its paid-up capital stock, outstanding at the close of the year, or if no capital stock, the amount of interest paid within the year on an amount of indebtedness not exceeding the amount of capital employed in the business at the close of the year, and in the case of a bank, banking association, or trust company, stating separately all interest paid by it within the year on deposits; or in case of a corporation, joint-stock company or association, or insurance company, organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded or other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, or if no capital stock, the amount of capital employed in the business at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States bears to the gross amount of its income derived from all sources within and without the United States; (seventh) the amount paid by it within the year for taxes imposed under the authority of the United States and separately the amount so paid by it for taxes imposed by the government of any foreign country; (eighth) the net income of such corporation, joint-stock company or association, or insurance company, after making the deductions in this subsection authorized. All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue.

All assessments shall be made and the several corporations, joint-stock companies or associations, and insurance companies shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessment shall be paid on or before the thirtieth day of June: *Provided,* That every corporation, joint-stock company or association, and insurance company, computing taxes upon the income of the fiscal year which it may designate in the manner hereinbefore provided, shall pay the taxes due under its assessment within one hundred and twenty days after the date upon which it is required to file its list or return of income for assessment; except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this section or by existing law, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint-stock company or association, or insurance company immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, or after one hundred and twenty days from the date on which the return of income is required to be made by the taxpayer, and after ten days' notice and demand thereof by the collector, there shall be added the sum of 5 per centum on the amount of tax unpaid and interest at the rate of 1 per centum per month upon said tax from the time the same becomes due.

(*d*) When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the Commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such: *Provided,* That any and all such returns shall be open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President: *Provided further,* That the proper officers of any State imposing a general income tax may, upon the request of the governor thereof, have access to said returns or to an abstract thereof, showing the name and income of each such corporation, joint-stock company, association or insurance company, at such times and in such manner as the Secretary of the Treasury may prescribe.

If any of the corporations, joint-stock companies or associations, or insurance companies aforesaid, shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such corporation, joint-stock company or association, or insurance company shall be liable to a penalty of not exceeding $10,000.

That, except as hereinbefore provided, sections one to forty-two, both inclusive, of an Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August fifth, nineteen hundred and nine, and all Acts and parts of Acts inconsistent with the provisions of this Act, are hereby repealed: *Provided,* That nothing in this Act shall be construed to permit any oaths to be demanded or fees to be charged except as provided in this Act or in section twenty-eight hundred and sixty-two of the Revised Statutes of the United States, nor to repeal or in any manner affect the following numbered sections of the aforesaid Act approved August fifth, nineteen hundred and nine, viz: Subsection twenty-nine of section twenty-eight and subsequent laws and amendments relating to the establishment and continuance of a Customs Court, subsection thirty of section twenty-eight, providing for additional attorneys, subsection twelve of section twenty-eight and subsequent provisions establishing a Board of General Appraisers of merchandise, sections thirty, thirty-one, thirty-two, thirty-three, and thirty-five, imposing an internal revenue tax upon tobacco, section thirty-six, providing for a tonnage duty, section thirty-nine, authorizing the Secretary of the Treasury to borrow on the credit of the United States to defray expenditures on account of the Panama Canal, section forty, authorizing the Secretary of the Treasury to borrow to meet public expenditures: *Provided further,* That all excise taxes upon corporations imposed by section thirty-eight, that have accrued or have been imposed for the year ending December thirty-first, nineteen hundred and twelve, shall be returned, assessed, and collected in the same manner, and under the same provisions, liens, and penalties as if section thirty-eight continued in full force and effect: *And provided further,* That a special excise tax with respect to the carrying on or doing of business, equivalent to 1 per centum upon their entire net income, shall be levied, assessed, and collected upon corporations, joint-stock companies or associations, and insurance companies, of the character described in section thirty-eight of the Act of August fifth, nineteen hundred and nine, for the period from January first to February twenty-eighth, nineteen hundred and thirteen, both dates inclusive, which said tax shall be computed upon one-sixth of the entire net income of said corporations, joint-stock companies or associations, and insurance companies, for said year, said net income to be ascertained in accordance with the provisions of subsection G of section two of this Act: *Provided further,* That the provisions of said section thirty-eight of the Act of August fifth, nineteen hundred and nine, relative to the collection of the tax therein imposed shall remain in force for the collection of the excise tax herein provided, but for the year nineteen hundred and thirteen it shall not be necessary to make more than one return and assessment for all the taxes imposed herein upon said corporations, joint-stock companies or associations, and insurance companies, either by way of income or excise, which return and assessment shall be made at the times and in the manner provided in this Act; but the repeal of existing laws or modifications thereof embraced in this Act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil case before the said repeal or modification; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made. Any offenses committed and all penalties or forfeitures or liabilities incurred prior to the passage of this Act under any statute embraced in or changed, modified, or repealed by this Act may be prosecuted or punished in the same manner and with the same effect as if this Act had not been passed. No acts of limitation now in force, whether applicable to civil causes and proceedings or to the prosecution of offences or for the recovery of penalties or forfeitures embraced in or modified, changed, or repealed by this act shall be affected thereby so far as they affect any suits, proceedings, or prosecutions, whether civil or criminal, for causes arising or acts done or committed prior to the passage of this act, which may be commenced and prosecuted within the same time and with the same effect as if this act had not been passed."

Sections 3226, 3227, and 3228 of the Revised Statutes of the United States.

Sec. 3226. (Suits for recovery of taxes wrongfully collected.)—No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided,* That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section.

Sec. 3227. (Limitation of suits for recovery of taxes wrongfully collected.)—No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: *Provided,* That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section.

Sec. 3228. (Claims for refundment—limitation.)—All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided,* That claims which accrued prior to June six, eighteen hundred and seventy-two, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date.

Second Proviso, Section 14 of the Act of September 8, 1916, of the United States (39 Stat. L. 772).

Provided, That upon the examination of any return of income made pursuant to this title, the act of August fifth, nineteen hundred and nine, entitled, "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," and the act of October third, nineteen hundred and thirteen, entitled, "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," if it shall appear that amounts of tax have been paid in excess of those properly due, the taxpayer shall be permitted to present a claim for refund thereof notwithstanding the provisions of section thirty-two hundred and twenty-eight of the Revised Statutes.

Consolidated Laws of the State of New York, 1909, Vol. 3, Chap. 33.

Section 2. The Superintendent of Insurance.—There shall continue to be a separate and distinct department charged with the execution of the laws relating to insurance, to be known as the insurance department, the chief officer of which shall be the superintendent of insurance, who, after the termination of the term of office of the present superintendent, or whenever a vacancy shall occur in the office, shall be appointed by the governor, by and with the advice and consent of the senate, and shall hold his office for the term of three years. He shall receive an annual salary of seven thousand dollars, which shall be in full of all services performed by him in any capacity. The superintendent and his deputies shall take and subscribe and file in the office of the secretary of state the constitutional oath of office within fifteen days from the time of notice of their appointment respectively. The superintendent shall, within the same time, give an official undertaking in the sum of twenty-five thousand dollars, with two good sureties to be approved by the comptroller. Neither the superintendent nor any deputy nor employee shall be directly or indirectly interested in any insurance corporation, except as an ordinary policy-holder.

Section 9. Certificate of Authorization of Superintendent.—No corporation, nor any individual, as principal, shall transact the business of insurance within this State without the certificate of the superintendent of insurance, certifying under his hand and official seal that such corporation or individual has complied with all the requirements of law to be observed by such corporation or individual, and that such corporation or individual is authorized to transact the business of insurance specified therein in this State. Such certificate shall be recorded in the office of the superintendent in a book to be kept by him for that purpose. No corporation or individual shall transact in this State any insurance business not specified in the certificate of authority granted by the superintendent. The superintendent may refuse to issue any such certificate to a foreign corporation, if, in his judgment, such refusal will best promote the interest of the people of the State. This section shall not apply to any domestic insurance corporations, existing on the first day of October, eighteen hundred and ninety-two or to fraternal insurance associations organized on the lodge system. Nothing in this section contained shall apply to any insurance company organized prior to the first day of October, eighteen hundred and ninety-two, under any general or special law of this State and carrying on business on said date, but every such corporation is hereby recognized as an existing corporation and is hereby authorized to continue as such corporation and to continue such business until the legislature shall otherwise provide, subject to such of the provisions of this chapter as are made applicable to such corporations.

Section 21. When Corporation to be Deemed Insolvent.—Every insurance corporation specified in articles two, three, four and five of this chapter, whose assets and credits are not sufficient to reinsure its outstanding risks in a solvent insurance corporation, shall be deemed insolvent and may be proceeded against as an insolvent corporation.

Section 25. Jurisdiction of Superintendent Over Foreign Corporations.—The superintendent of insurance shall have the same supervision and make the same examination of the business and affairs of every foreign insurance corporation doing business in this State, as of domestic insurance corporations doing the same kind of business, and of its assets, books, accounts and general condition. Every such foreign corporation and its agents and officers shall always be subject to and be required to make the same statements and answer the same inquiries and be subject to the same examinations, and, in case of default therein, to the same penalties and liabilities as domestic insurance corporations doing the same kind of business, or any of the agents or officers thereof, are or may be liable to under the laws of this State or the regulations of the insurance department.

The superintendent may, whenever he deems it necessary, either in person or by a proper person appointed by him, repair to the general office of such foreign corporation, wherever the same may be, and make an investigation and examination of its affairs and conditions. He may cancel and revoke the certificate of any such foreign corporation refusing or unreasonably neglecting to comply with the provisions of this section, or to allow the examination herein provided for to be made, and prevent such corporation from further continuance in business in this State.

A foreign insurance corporation may transact in this State only such kinds of business as, under the laws of this State, a like domestic insurance corporation is authorized to transact: *Provided,* That any insurance corporation organized under the laws of another State of the United States and lawfully transacting either fire or marine insurance in this State on the first day of October, eighteen hundred and ninety-two, may be licensed to transact both fire and marine insurance if duly authorized so to do by the law of the State where it is organized: *Provided, further,* That any such corporation be possessed of a cash capital equal in amount to the cash capital required by the laws of this State for a company to do fire insurance and a company to do marine insurance.

No such corporation shall transact any business in this State not specified in the certificate of authority granted by the superintendent.

Section 32. Renewal of Certificate of Authority.—The certificate of authority granted by the superintendent of insurance, pursuant to the provisions of this chapter, to a foreign insurance corporation to do business in this State, shall not remain in force for a longer period than one year, and all such certificates shall expire on the thirtieth day of April next following the date of issue. The statements and evidence of investment required by this chapter to be filed in the office of the superintendent before a certificate of authority is granted to a foreign corporation, shall be renewed from year to year, in such manner and form as the superintendent may require, with an additional statement of the amount of premiums received and losses sustained in this State during the preceding year so long as such authority continues. If the superintendent is satisfied that the capital, securities and investments remain secure, and that it may be safely intrusted with a continuance of its authority to do business, he shall grant a renewal of such certificate of authority.

Section 86. What Shall be Allowed as Assets; Impairment of Capital Stock. * * * In estimating the condition of any casualty insurance corporation, under the provisions of this chapter, the superintendent shall allow as assets only such investments as are authorized by the existing laws of this State, at the date of its investigation; and shall charge as liabilities, in addition to the capital stock, all outstanding indebtedness of the corporation, and the premium reserve on policies in force, equal to the unearned portions of the gross premiums charged for covering the risks, computed on each respective risk from the date of the issuance of the policy. There shall also be charged as a liability to each company which undertakes or writes insurance under subdivision three of section seventy of this act, whether organized under this or any other State or country, a further reserve as hereinafter provided. For the purpose of computing said reserve, each such company which has been engaged in liability underwriting for ten years or more, shall, on or before the first day of October in each year, state in writing to the superintendent of insurance its experience in the United States, under all forms of liability policies, each year separately according to the calendar years in which the policies were written, during a period of five years commencing ten years previous to the thirty-first day of December of the year in which the statement is made, in the following particulars, namely: The number of persons reported injured under all the forms of liability policies, whether such injuries were reported to the home office of the given company or to any of its representatives; the amount of all payments made on account or in consequence of injuries reported under such policies; the number and amount, separately, of all suits or actions against policyholders under such policies which have been settled, either by payment or compromise; both of the above amounts to be ascertained as of date of the thirty-first day of August of the year in which the statement is made, and to include in the case of suits all payments made on account or in consequence of the injury from which the suit arose, whether prior to or later than the date at which the suit was brought. Each such company shall thereupon reserve upon all said kind of policies, irrespective of the date at which the policies were issued (1) for each suit or action pending, on injuries reported prior to eighteen months previous to the date of making the statement, whether such injuries were reported to the home office of the given company or to any of its representatives, and which is being defended for or on account of the holder of any such policy, the average cost thereof as shown by said experience, and (2) for injuries reported under such policies at any time within eighteen months, whether such injuries were reported to the home office of the given company or to any of its representatives, the average cost for each injured person as shown by said experience. From the sum so ascertained the company may deduct the amount of all payments made on account or in consequence of said injuries reported within eighteen months, this amount to be taken as of the date at which the statement is made. Any company which now issues, or shall hereafter issue, liability policies as aforesaid, and which has not been engaged in liability underwriting for ten years, shall nevertheless, until such time as it may be able to state its experience of the period hereinbefore required, make and maintain a reserve upon all of said kind of policies, irrespective of the date at which the policies were issued, determined as follows: (1) for each suit or action pending, on injuries reported prior to eighteen months previous to the date of making the statement, whether such injuries were reported to the home office of the given company or to any of its representatives, and which is being defended for or on account of the holder of any such policy, the average cost thereof as shown by the average of said experience of all other companies stated as required by this section, and (2) for injuries reported under such policies at any time within eighteen months, whether such injuries were reported to the home office of the given company or to any of its representatives, the average cost for each injured person as shown by the average of said experience of all other companies stated as required by this section: which average costs for suits and for injured persons shall be furnished by the superintendent of insurance to each such company on or before the first day of December, in each year. From the sum so ascertained each such company may deduct the amount of all payments made on account or in consequence of said injuries reported within eighteen months, this amount to be taken as of the date at which the statement is made.

Wisconsin Statutes 1898, Vol. 1, Section 1966-32.

Section 1966-32. Conditions of Doing Business.—Any casualty insurance or suretyship corporation organized under the laws of any other State or foreign country may be admitted to transact business in this State by filing with the commissioner of insurance for his approval, the following documents and papers:

1. An application for license to do business in this State, setting forth the full name of the corporation, the location of its principal place of business and, separately, the several kinds of business to be transacted; said application to be signed only by the president or general manager.

2. A statement verified by the oath of the president, secretary or manager residing in the United States, showing to the satisfaction of the said commissioner that the corporation has a capital stock of at least $100,000 and has a like amount invested in securities deposited with the superintendent of the insurance department, State treasurer or other proper officer of some one of the States of the United States, that such securities are not pledged or incumbered and have a market value of at least $100,000, but are held and remain for the benefit and security of the policyholders of such corporation residing in the United States, or in default of such statement shall deposit with the State treasurer, for the benefit and security of policyholders residing in this State not less than $50,000 in such securities; *Provided,* That if such corporations shall desire to do business under more than one of the subdivisions of section 1966-25 it shall make an additional deposit of $50,000, in securities as aforesaid for each additional subdivision that it desired to do business under. The stocks and securities so deposited may be ex-

changed from time to time for other securities to be approved by the commissioner of insurance, and so long as the corporation so depositing shall continue solvent and comply with the laws of this State it may be permitted by the State treasurer to collect the interest or dividends on such securities.

3. A copy of its charter and by-laws, duly certified to by the superintendent of the insurance department or other proper officer of the State or country wherein incorporated, together with a certificate of such officer that the corporation is duly organized and licensed to transact business of casualty or fidelity insurance in such State or country, stating separately the different kinds as provided in section 1966–25, together with an appointment of the commissioner of insurance of this State and his successors in office as attorney upon whom any summons, notice, or process of any court of this State may be served, as required of fire insurance corporations of other States.

4. A complete statement of the financial condition, as shown by the last annual statement of the insurance department of the State or country where incorporated, and a financial statement showing the condition of the corporation on the first day of the month next preceding the date of application. All such corporations admitted to transact business in this State must comply with the laws governing like corporations organized under the laws of this State, except as hereinbefore provided; all such corporations and all persons acting as agents thereof shall be subject to the same penalties prescribed by these statutes relating thereto for the violation of any of the provisions thereof and to the same methods for the enforcement of such penalties.

Section 1966–47. Reserve Liability.—In computing the reserve liability of casualty insurance and suretyship corporations the commissioner of insurance shall make such calculations as in his judgment are equitable and just to both policyholders and the company; *Provided,* That such liability so determined shall not be less than fifty per cent of the premiums written in the company's policies.

Section 1972*a*. Proceedings if Law Violated—Expenses.—The commissioner of insurance shall bring notice of the violation of any of the provisions of this chapter by insurance companies to the notice of any company which shall have committed the same; and in case of persistent violation thereof by any company he shall, if the company be incorporated under the laws of this State, report the same to the attorney general; and if it be incorporated under the laws of any other State or country he shall revoke its authority to do business in this State; and upon satisfactory evidence to him of the violation of any of such provisions by any agent of any such corporation he shall revoke the license of such agent. Said commissioner shall also bring or cause actions to be brought to recover all forfeitures imposed by these statutes for a violation of any of their provisions by insurance companies or their agents; and all necessary expenses incurred by him in such actions, and in representing this State at the annual meeting of the annual convention of the insurance commissioners of the several States shall, and his certificate that the expenses incurred were actually necessary, be audited by the Secretary of the State. It shall be the duty of the attorney general to prosecute in the name of the State or to compromise every such forfeiture; and his necessary expenses incurred in so doing, when so certified, shall be audited as aforesaid. All forfeitures collected in such actions shall be paid to the State treasurer for the benefit of the general fund.

Section 1968. Investigation; Fees; Revocation of Licenses.—The commissioner of insurance may address inquiries to any insurance corporation doing business in this State or any officer thereof in relation to its doings or condition, or any other matter connected with its transaction; and it shall be the duty of every corporation, or officer so addressed to promptly reply in writing to such inquiries; and whenever he shall deem it expedient so to do, or when any responsible person shall file with him written charges against any such corporation alleging that any return or statement filed by it with such commissioner is false, or that its affairs are in an unsound condition, he shall, in person, or by some one to be appointed by him for that purpose, not an officer or agent of, or in any manner interested in, any insurance corporation doing business in this State, except as a policyholder, examine into its affairs and condition; and it shall be the duty of the corporation, its officers or agents to cause its books to be opened for inspection, and to pay all reasonable expenses of and compensation for such examination upon the certificate and requisition therefor of said commissioner; which expenses, however, shall not exceed $5.00 per day during the time of the examination and five cents per mile for traveling by the most direct route in going to and coming from the place where such examination took place; but no corporation examined shall, either directly or indirectly, pay by way of gift, gratuity, or otherwise any other or further sum to said commissioner or examiner for service, extra services, or for purposes of legislation or on any other pretense whatever. Any commissioner, examiner, officer, clerk or employee of any insurance company violating any provision of this section shall be guilty of a misdemeanor. Whenever it shall appear to the said commissioner from his own examination or the report of the person appointed by him that the condition of any foreign company examined is unsound he shall revoke the certificate granted such company and cause a notification thereof to be published in the official State paper and mail a copy thereof to each agent of the company, and the agent or agents thereof, after such notice, shall be required to discontinue doing business for such company. The commissioner shall, in like manner and upon like conditions, examine insurance corporations applying for admission to transact business in this State, and if the affairs or condition of any such corporation do not fully meet the requirements of law he shall withhold his certificate.

Wisconsin Statutes Supplement Vol. 3, 1899–1906, Section 1971.

Statement. Section 1971 (as amended by Chap. 192, 1899, and Chap. 451, 1905).

The commissioner of insurance shall prepare and furnish to each insurance corporation organized under the laws of this State and to the attorneys of corporations incorporated in other States and countries, doing any business of insurance in this State, printed forms of annual and other statements as required by law to be made by such corporations, and may make such changes in such forms as shall seem best adapted to elicit from them a true exhibit of their condition in relation to the matters required by law to be reported to him; and all such corporations shall make such statements as required by said commissioner; and he may, for such reasons as he shall deem sufficient, extend the time for filing such annual statements, but not exceeding sixty days. He shall cause the information contained in such statements to be arranged in tabular form and publish the same with his report. He shall during the first week of the months of January, April, July, and October of each year hereafter cause to be published in the official State paper and in one other daily paper, which, in his judgment, will give information to the greatest number by one insertion in each such newspaper, a statement over his signature, containing the names of such insurance corporations as have complied with all the laws of this State, relating to such corporations and are duly licensed and authorized to transact business therein.

Wisconsin Statutes 1911.

Section 1966*y*. Commissioner; Qualifications, Appointment and Term.—1. The governor, by and with the advice and consent of the senate, shall appoint a commissioner of insurance forthwith upon the taking effect of this act, and every four years thereafter. Such commissioner shall hold office for four years and until his successor is appointed and qualified. Any vacancy shall be filled by the governor for the unexpired term, subject to confirmation by the senate, but such appointment shall be in force until acted upon by the senate.

2. The person so appointed as such commissioner shall be known to possess a knowledge of the subject of insurance, and skill in matters pertaining thereto. No person appointed as such commissioner shall hold any other office under the laws of this or of any other State or of the United States. Such commissioner shall devote his entire time to the duties of the office, and shall not hold any position of trust or profit, engage in any occupation or business interfering with or inconsistent with his duties, or serve on or under any political committee or as manager of any political campaign for any candidate or party.

3. All duties, rights, privileges, powers, compensation, and liabilities, now by law granted to or imposed upon the commissioner of insurance, are merged in and extended to the office of commissioner of insurance, hereby created, so that the office hereby created shall in all respects succeed to and stand in lieu of the former office of commissioner of insurance, which is abolished from and after the taking effect of the first appointment under this section.

Section 1968. Examinations; Revocation of Licenses; Admission; Deposit; Employees; Expenses; Collection; Audit and Payment.—1. The commissioner of insurance may address inquiries to any insurance company doing business in this State or any officer thereof in relation to its doings or condition, or any other matter connected with its transaction; and it shall be the duty of every company, or officer so addressed to promptly reply in writing to such inquiries; and

2. Whenever he shall deem it expedient so to do, or when any responsible person shall file with him written charges against any such company alleging that any return or statement filed by it with such commissioner is false, or that its affairs are in an unsound condition, he shall, in person, or by some one to be appointed by him for that purpose, not an officer or agent of, or in any manner interested in, any insurance company doing business in this State, except as a policyholder, examine into its affairs and condition; and it shall be the duty of the company, its officers or agents to cause its books to be opened for inspection.

3. Whenever it shall appear to the said commissioner from his own examination or the report of the person appointed by him that any foreign company examined is unsound, he shall revoke the certificate granted such company and cause a notice thereof to be published in the official State paper and mail a copy thereof to each agent of the company. The agent or agents thereof, after such notice, shall be required to discontinue doing business for such company.

4. The commissioner shall examine insurance companies applying for admission to transact business in this State, and if the affairs or condition of any such company do not fully meet the requirements of law he shall withhold his certificate.

5. The commissioner may require from any insurance company and any mutual benefit society, before, and from time to time during any examination, a deposit with him of

such amount as he shall estimate necessary for the expense of such examination. The company or society, through the commissioner, as ordered by him, shall pay into the State treasury the actual cost of such examination in expenses paid or to be paid by the State, and compensation to persons other than officers and employees of the State, and the balance deposited, if any, shall be returned to the company or society making such deposit, at the close of such examination.

6. The commissioner may employ such persons at such compensation fixed by him in advance as may be necessary and reasonable for the making of any examination, investigation or prosecution provided for by law.

7. There shall be paid out of the State treasury, upon vouchers approved by the commissioner and audited by the secretary of state, all actual and reasonable expenses of any officer or employee of the department of insurance, and the compensation and all such expenses of any persons employed by the commissioner of insurance under subsection six.

8. Such actual and reasonable expenses shall include only actual disbursements for railroad fare and other public conveyance by the most usual and most direct or most traveled route, sleeper, meals, rooms, postage, telegraph, telephone, public messenger and stenographic service.

9. There is appropriated a sum sufficient to carry out the purpose of this section, not exceeding the amount paid into the State treasury under this section.

Section 1970*p*. Orders of Commissioner; Service of Notice.—1. Notice of the making of any order by the commissioner of insurance may be given by sending to any company, society, or person affected thereby, a copy of such order by prepaid registered mail, the service of which notice shall be complete upon the delivery or tender of the same to such company, society, or person by the postal authorities, and may be proved by the receipt of the addressee on the form used by the postal authorities.

Rehearing by Commissioner.—2. Within ten days after receiving from the commissioner of insurance written notice of the making of any order authorized by law, and not thereafter, the company, society, or person affected thereby, by verified petition specifying the reasons therefor, may ask for a rehearing and review thereof before the commissioner, which shall be had within ten days unless such company, society, or person shall request otherwise, and the final order shall be made within three days after the close of such hearing. All evidence presented on such hearing shall be carefully preserved.

Procedure for Court Review; Exception.—3. Any such final order may be reviewed in the circuit court for Dane county, subject to removal as in other cases, provided:

(*a*) The application for such review stating the grounds thereof shall be made and notice given to the commissioner within ten days after notice of such final order, and not otherwise.

(*b*) Such application shall be heard upon all the evidence presented before the commissioner and no further or additional evidence shall be presented before the court. But the applicant shall be entitled to a further hearing or further hearings before the commissioner, at which either party may present additional evidence on which the commissioner may make such further order as the case may require.

(*c*) That no review, under this subsection, shall be had upon any order of the commissioner granting or refusing the license or authority of any company or mutual benefit society not organized under the laws of this State, to transact business in this State, where such company or society shall not on the date of the application for such license or authority, be transacting business in this State under a license or authority theretofore granted.

Section 8 of the Act of June 1, 1911, of the State of Pennsylvania (P. L., 607).

Section 8. He shall, in calculating the reserve against unpaid losses of casualty companies, other than losses under liability policies, set down by careful estimate in each case the loss likely to be incurred against every claim presented, or that may be presented in pursuance of notice from the insured of the occurrence of an event that may result in a loss; and the sum of the items so estimated shall be the total amount of the reserve; except, in credit insurance, fifty per centum of the premiums on all credit policies expiring in the months of October, November, and December of the current year, less the amount of losses paid on such policies, shall, in addition thereto, be charged in the loss reserve.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 395.

THE MARYLAND CASUALTY COMPANY,
A CORPORATION, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

MOTION FOR ORDER FOR FINDING OF ADDITIONAL FACTS BY THE COURT OF CLAIMS.

The appellant, The Maryland Casualty Company, by its attorneys, respectfully represents unto this honorable court:

I.

This cause involves the construction and application of section 38 of the act of August 5, 1909, 36 Stat. L., 112 (known as the Corporation Excise Tax Act of 1909), and section 2, division G, of the act of October 3, 1913, 38 Stat. L., 172 (known as the Income Tax Act of 1913), as applied to Federal taxation for the years 1909 to 1913, inclusive.

II.

Each tax is based upon the income of the corporation taxed, the items composing which are numerous. The items themselves are not in dispute, the record in the Court of Claims containing undisputed evidence as to each item, but whether certain of such items are debits or credits or exempt under the law is in dispute.

III.

Appellant's request for findings of fact and brief was regularly filed May 19, 1916, which included (I) a request that appellant's net addition to reserve funds required by law for 1909 be found as $497,231.60, which included reserves for increase in indebtedness for brokerage $22,048.09, and increase in indebtedness for taxes $16,490.35, and for 1910 be found as $453,406.96, which included $42,389.46 increase in indebtedness for brokerage and $15,846.28 increase in indebtedness for unpaid salaries; (II) a request that appellant's premiums in course of collection December 31, 1913, be found as $1,140,370.29.

IV.

That thereafter the appellant and defendants in co-operation drafted from the undisputed evidence, the finding of facts appearing in the record, and the court found (February 12, 1917) such facts and remanded the case to the general docket for a restatement of accounts, it being evident that the finding of facts was not in detail sufficient to determine the issues involved. Thereupon appellant discovered that the items above specifically set forth had been omitted from the finding of facts and immediately (March 14, 1917) appellant moved to have the said items incorporated in the findings, which motion was denied. Appellant then made, September 28, 1917, a motion for leave to file a motion to amend the findings as above set forth. This was denied. These motions were filed before judgment, which was rendered December 3, 1917. On January 30, 1918, appellant moved for a new trial and amendment of findings, among other grounds therefor being the omission of the items above set forth. The said several motions and the record evidence as to such items are attached hereto and made a part hereof.

V.

Appellant further shows that its premium income is collected and remitted to it by agents. The point of law involved is whether appellant should be charged with the receipt of such items as of the date such items are received by it, or as of the date received by its agents for collection and remittance. That this question involves the relations existing between it and its agents. That such relations are governed by contract, a copy of which is attached hereto and made a part hereof.

VI.

That in the motion above referred to as having been made March 14, 1917, there was a request that such contract be incorporated in the findings as the contract existing between appellant and its agents. This motion was denied.

That such contract was introduced in evidence upon an order of the court entered after the findings of fact were filed and after such motion was made, directing further evidence to be taken relative to the sums collected by appellant's agents, but not remitted to it until after the taxing year.

VII.

Appellant further shows that one of the issues herein is the construction and application of that clause of the Excise Tax Law allowing, as a deduction from income, net additions to reserve funds "required by law." That the laws of certain states for the period 1909 to 1913, inclusive, set forth the method of ascertaining the reserve for unearned premiums and the reserve for losses on employers' liability policies. That during and since 1911 the statute laws of Pennsylvania have set forth the method of computing all losses on policies other than employers' liability policies. That reserves for all outstanding indebtedness due or accrued were required by the State Insurance Departments. That the point of law involved is whether the phrase "required by law" means both those reserves whose method of computation is mentioned in the state statutes and those required by State Insurance Department orders or regulations, or means only those mentioned in detail in the state statutes. That to determine the total amount of appellant's income, exempt by law, under the above point of law, it is necessary that the sum of the losses on policies other than employers' liability policies outstanding at the close of the year 1911, be determined. That no finding thereon was made. That undisputed evidence thereof was introduced, showing such sum as $295,031.96.

That in the motion for leave to file a motion to amend filed September 28, 1917 (before judgment), a finding as to the fact above set forth was requested and that the failure of the court to so find is alleged as error in the motion for new trial.

Appellant further shows that the motion of March 14, 1917, above referred to was made with the consent and approval of defendants.

Appellant further shows that the finding of the Court of Claims fails to show all of the disputed items of record which affect taxable income for the years 1909, 1910, 1911, and 1913, and the contract under which appellant's premiums were remitted to it. That such items and contract are essential to a decision of the legal issues herein.

Wherefore, appellant moves this court to remand this cause to the Court of Claims with direction to find from the evidence now on its record,—

First. Whether or not appellant's increase in indebtedness for brokerage, commissions, etc., for year 1909, over such indebtedness for the year 1908, was $22,048.09 and, if not this sum, then what, if any, was such increase.

Second. Whether or not appellant's increase in indebtedness for taxes for the year 1909, over such indebtedness for 1908, was $16,490.35, and, if not this sum, then what, if any, was such increase.

Third. Whether or not appellant's increase in indebtedness for brokerage, commissions, etc., for the year 1910, over such indebtedness for the year 1909, was $42,389.46, and if not this sum, then what, if any, was such increase.

Fourth. Whether or not appellant's increase in indebtedness for unpaid salaries for the year 1910 over such indebtedness for the year 1909, was $15,846.28, and if not this sum, then what, if any, was such increase.

Fifth. Whether or not the contract hereto annexed and appearing in the Court of Claims record on pages 450 to 456, inclusive, is the contract under which appellant's agents collected and remitted to it its premiums from 1909 to 1913, inclusive.

Sixth. Whether or not the amount of appellant's premium income in course of collection by its agents and unremitted to it December 31, 1913, was $1,140,370.29, and, if not this amount, then such amount as was then so outstanding.

Seventh. Whether or not the amount of unpaid losses on policies other than employers' liability policies for the year 1911 was $295,031.96, for which reserve was required, and if not this amount, then such amount as was so unpaid.

Eighth. Inasmuch as none of the above facts are in dispute, appellant moves that each be embraced in the record in this court without remand to the Court of Claims.

ABRAM R. SERVEN,
BURT E. BARLOW,
Attorneys for Appellant,
Maryland Casualty Company.

AFFIDAVIT OF COUNSEL.

DISTRICT OF COLUMBIA, *ss:*

ABRAM R. SERVEN, being duly sworn, deposes and says that he is one of the attorneys for the appellant in the above entitled cause, No. 395, October term, 1918; that he is familiar with the record thereof in the Court of Claims and in this court; that he helped to prepare and has heard read the foregoing motion; that he believes the facts therein set forth to be true; that in his opinion the facts set forth in the findings of the Court of Claims, are insufficient for this court to pass properly upon the items of claim in dispute; that the findings of fact are insufficient in not including the contract under which agents remitted premiums collected to appellant; and that without such a contract the court cannot properly pass upon the issue submitted to it; that the findings of the Court of Claims are insufficient in not finding the amount of appellant's premium income in course of collection, in the hands of its agents and unremitted to it, December 31, 1913; and that without this item this court cannot properly pass upon the issue submitted to it; that the findings of fact of the Court of Claims are insufficient in not showing the reserve for losses on policies other than employers' liability policies for the year 1911; and that without such finding this court cannot properly pass upon the issues submitted to it.

ABRAM R. SERVEN.

Subscribed and sworn to before me this 4th day of June, 1919.

[SEAL.]

W. B. JAYNES,
Notary Public.

Brief on Foregoing Motion.

Motions of this character are so often before this court that appellant believes it unnecessary to cite *in extenso* the rules of court (Rule II and V of Supreme Court Rules on appeals from the Court of Claims) under which the findings of fact of the Court of Claims are made. It now seems to be the well settled practice of this court that where findings of fact are omitted from the findings of fact made by the Court of Claims, where such omitted findings are material to the issues involved, that this court, upon motion showing the materiality of the findings of fact to the issue, will remand the case to the Court of Claims for additional or amended findings. United States *vs.* Adams, 9 Wallace, 661; Ripley *vs.* United States, 220 U. S. 491; United States *vs.* Archer, 241 U. S., 1[illegible]9, and cases cited therein.

In those cases in which the facts omitted from the findings are undisputed and there is, therefore, no exercise of judgment, or the weighing or balancing of testimony by the Court of Claims, it is now the practice of this court to incorporate such facts in the record without remanding the case to the Court of Claims for additional findings. Ceballos *vs.* United States, 214 U. S., 47. United States *vs.* Societe Anonyme Des Anciens Establissements Cail, 224 U. S., 309-330, in which the court held: "Ceballos *vs.* United States 214 U. S., 47, 53; L. ed., 904; 29 Sup. Ct. Rep., 583, is not applicable. There was a contract of which there could be no dispute, and therefore a motion to embrace it in the record from the Court of Claims was granted and the case reviewed in the light thereof."

The facts upon which this motion is made are fully set up therein. Each of the items showing amounts requested to be added to the findings of fact of the Court of Claims is material to the issues in this case, and each item is claimed to be a deduction from the gross income of appellant under the clauses of the taxing statutes. The issues of law to be presented to the court for decision will determine whether each of such items asked to be added to the findings of fact are debits or credits in appellant's income and are necessary to determine the amount of appellant's income subject to taxation. None of the items are disputed as to their correctness in amount or the character of the liability which the item represents.

The contract between appellant and its agents is necessary in determining whether the receipt by the agents of premiums collected by them was receipt by appellant before such premiums were remitted by such agents to it. The issue of law presented to this court as to whether appellant should be charged with premiums before it has received them from its agents cannot be determined without a construction of the contract between it and its agents. The terms of the contract are not in dispute. It will be seen, therefore, that none of the findings asked to be added to the findings of fact of the Court of Claims require the exercise of judgment, the weighing of evidence, or balancing of testimony. It, therefore, remains only to be considered whether there is any reason why findings material to this case and which are undisputed should be excluded from the consideration of this court. In this connection, it should be noted that all of the findings asked to be added to the findings of fact of the Court of Claims were called to the attention of the Court of Claims as having been omitted from its findings prior to the entry of judgment on the part of the Court of Claims, and that all of such findings were afterwards called to the attention of the Court of Claims in appellant's motion for a new trial.

Ordinarily courts are anxious to include all material facts in their findings of fact, this being the purpose for which they are organized, and is recognized by the Court of Claims in theory, as appears from the following (Record, p. 39): "It is not always difficult to amend a record after the court has delivered its opinion, and it not infrequently occurs that the holding of the court suggests amendments to findings when in the interest of justice and the expedition of cases it ought to have been brought in in the first instance." Some further reason must be urged why the facts undisputed, appearing in the several motions for amendment, should be excluded from the record, and this requires an analyzation of the court's opinion denying such motion.

The first objection, on the part of the Court of Claims to allow the motion for amended findings, appears on page 38 of the record and is announced as being because the motion was not supported by an affidavit and did not otherwise comply with the rules. The rules of the Court of Claims do not require an affidavit to a motion to amend, nor does appellant know of any court that requires an affidavit to a motion setting up facts which are of record in the court. This is not a case of newly discovered evidence. It may be, therefore, stated that this reason for the denial of the motion was without merit. To the best of the appellant's knowledge, the motion otherwise complied with the rules. Moreover, if the motion was not in accordance with strict formality, the court, in the furtherance of justice, should have allowed an amendment thereof.

The second objection, assigned by the Court of Claims for a denial of the motion, was because the motion disturbed a stipulation solemnly made between the appellant and defendant, setting up the findings of fact to be made in the case. In this regard, it is well to note that the parties could not, under the rules of the Supreme Court, stipulate a single material fact, which the evidence disclosed, out of the case, or a single material fact into the case which was not fully established by the record evidence. Rule II of this court's rules on appeals from the Court of Claims provides that the record to this court shall contain "a finding by the Court of Claims of the facts in the case, *established by the evidence*, in the nature of a special verdict, etc." The Court of Claims is to act upon the evidence before it, not upon stipulations of counsel; otherwise the door to fraud upon the Government would be wide open. This is not intended and counsel cannot stipulate facts. It is sometimes done, but never is binding when objection is made. Further, that the Court of Claims does not recognize as binding a stipulation as to findings of fact between a claimant and the representatives of the Government of the United States. Campbell *vs.* United States, 19 Ct. of Cl., Rep. 426-429; Jones and Laughlin, Ltd., *vs.* United States, 42 Ct. of Cl. Rep., 178-185. Further, it should be noted that there was no stipulation between the parties to this case, nor does any stipulation appear in the record. An agreement was reached between counsel as to what they considered the material facts in the case, which statement of material facts was later separately presented in printed form by both the claimant and defendant to the court for its consideration. It was not supposed, understood, or intended that the statement of facts as presented was binding upon the court, or that counsel were foreclosed from moving additions or amendments thereto, if material facts were omitted or the language of the findings or the specific items included therein were not fully substantiated by the evidence before the court. Nor is there anything in the record from which such a supposition could be deduced. The court later, presumably after an examination of the record, found that the facts as submitted separately by appellant and defendant, were the facts in the case. If any material facts were omitted, under a proceeding of this character, and certainly when defendants stated there was no objection, it would appear to be the duty of the court, upon its attention being called thereto, to amend the findings to conform with the evidence before it. Otherwise, there would be a denial of justice. This objection would, therefore, appear to be without merit.

The third objection of the Court of Claims appears upon page 38 of the record, and is that the finding of facts, as submitted to the court, did not contain the figures asked to be added and that the addition to the findings of fact of such figures would raise a new issue for the court to pass upon and might change its decision. If this were the case, it is indeed a novel contention on the part of the court that it will not consider facts appearing in its record which change its decision when such facts are called to its attention before judgment. Such a contention is not in accord with justice and its statement contains its own answer, namely, that it is the real facts introduced in evidence that the court should pass upon when those facts are called to its attention before judgment. But this objection is without foundation because the figures which are requested to be added to the findings of fact, do not, in any way, change the decision of the court. The figures asked for in requests for findings I, II, III, and IV herein were items omitted from reserves required by the insurance departments of the various states.

When the court held (Supreme Court record, page 35) that "the State Statutes prescribed the necessary reservations, and the Commissioner was within the law in holding fast thereto," it excluded from consideration all items of reserves required by order of the State Insurance Departments, which were not specifically mentioned in the State Statutes, and as the above items were part of the reserves required by the State Insurance Departments and not set forth specifically in the state laws, their addition to the findings could, in nowise, affect the decision of the court, as they merely increased the sum already appearing as the reserve required by the State Insurance Departments and did not do away with such reserve or change its character in any degree. They are, however, material and necessary to the finding of fact in order to complete the total sum which appellant claims should be deducted from its income as reserves required by order of the State Insurance Departments. To the same effect is the request for the inclusion in the findings of fact of the sum reserved for losses on policies other than employers' liability policies for the year 1911. The inclusion of such figures does not, in any way, change the decision of the court, or introduce any new issue in the case; it is necessary because without it appellant's total claim for exemption because of reserves required by law as construed by the lower court, is not included in the findings of facts for the year 1911.

The inclusion of the amount of premiums in the hands of agents, for collection and remittance to the company, December 31, 1913, is of the same character as the inclusion of the above items in the findings of fact. When the Court of Claims held (Record, page 33) that "payment to the agent is payment to the principal," it passed upon all of the items in the hands of agents for collection at the end of each of the years in question and the inclusion in the findings of fact of the 1913 item would, in no way, modify or change the court's decision, but would operate only as showing the amount of deduction claimed by appellant for the year 1913, which otherwise does not appear in the findings of fact.

The lower court refused to make a finding as to the contract between appellant and its agents, alleging that it was cumulative evidence merely. In this regard, it is the contention of the appellant in this court, and was the contention of the appellant in the lower court, that payment to the agent was not payment to the principal, where the agent was merely an agent for collection and remittance, and not an agent for investment or deposit. It is one of the errors to be assigned on the appeal that the court failed to find that payment to the agent in this case was not payment to the principal, as between the agent and the principal. In order to determine the character of the agency, the contract of agency is necessary. The inclusion, therefore, of the contract in the findings of fact in the Court of Claims is not cumulative evidence, but is the evidence upon which the decision of the court should rest and was, therefore, necessary to the case. It should be noted as to the motion for the remanding of the case to the Court of Claims for a finding of fact as to the contract, that this contract was introduced in evidence after the findings of fact were made by the court and that under the circumstances the only method that the appellant had to have such contract included in the findings of fact was by a motion to amend the findings, which motion the appellant promptly made.

To sum up briefly, the facts moved to be included in the findings of fact in the Court of Claims are not disputed. That as to requests for findings I, II, III and IV herein, and the inclusion in the record of the premiums in course of collection by appellant's agents on December 31, 1913, and the inclusion in the record of the contract between the appellant and its agents, the attorneys for the Government consented thereto. That all of such facts are necessary and material to the issues of law involved herein; that none of such facts require the exercise of judgment or the weighing of testimony or evidence on the part of the Court of Claims in order that a finding be made thereon.

It is, therefore, respectfully submitted that the facts herein set forth should be, by order of this court, embraced in the record, or the case remanded to the Court of Claims for further findings.

ABRAM R. SERVEN,
BURT E. BARLOW,
Attorneys for Appellant.

UNDISPUTED EVIDENCE SUPPORTING THE I, II, III, IV, VI, AND VII REQUESTS FOR ADDITIONAL FINDINGS OF FACT.

Testimony of James H. Patton, a Witness Produced and Sworn on Behalf of Claimant, Appearing on Page 196 of the Court of Claims Record.

"4. Question. Are the net additions, as contained in Section 18 of the amended petition, the correct net additions to your reserve funds for the various years of 1909 to 1913, as shown by the books of the company?

"Answer. They are. If there is any difference in these amounts, as shown in the reports to the State insurance department or returns to the Government as to these figures, I would state the net additions to reserve, as set out on page 12 of the amended petition, are the correct figures and should govern.

(Note.—The following paragraphs of Section 18 of appellant's amended petition which appears on page 8 of the record herein are set forth below:)

"For 1909. Unearned premiums, $205,447.85; loss claims, $14,510.99; liability claims, $238,734.32; brokerage, etc., $22,048.09; Taxes, $16,490.35; total, $497,231.60."

"For 1910. Unearned premiums, $239,560.21; loss claims, $52,240.81; liability claims, $94,010.81; brokerage, etc., $42,389.46; taxes, $9,359.39, salaries, etc., $15,846.28; total, $453,406.96."

The following testimony appears on pages 31 and 32 of the record in the Court of Claims in the testimony of James H. Patton:

"2. Question. If you are the treasurer of the said company, state whether you are familiar with the information contained in the annual report of your company as published by the insurance department of the State of Maryland?

"Answer. I am familiar with the information contained in the annual reports of Maryland Casualty Co., as published by the insurance department of the State of Maryland.

"3. Question. Is the information so published in these reports regarding your company, for business transacted from 1908 to 1913, inclusive, truly and correctly stated, to the best of your knowledge and belief?

"Answer. The information so published in those reports, for business transacted by the Maryland Casualty Co., from 1908 to 1913, inclusive, is truly and correctly stated, to the best of my knowledge and belief.

"4. Question. Do these State reports show the net cash actually received for premiums or the net amount of premiums for insurance written by your company during each of these years?

"Answer. These State reports show the net amount of premiums for insurance written by my company during each of these years.

"5. Question. If you can do so, please furnish the information so published regarding your company by your State insurance department for each of the years 1908 to 1913, inclusive?

"Answer. I can and do furnish you herewith, as a part of my answer, the information published by the insurance department of Maryland regarding my company for the years 1908, 1909, 1910, 1911, 1912, and 1913. The sheets containing this information bear at the tops the years covered thereby, and are arranged in chronological order."

(NOTE.—Only the material items from the State reports are set forth below:)

(*State Report.*)

1908.

Maryland Casualty Co. of Baltimore, Md.

(Commenced Business March 1, 1898.)

* * * * * * *

Liabilities.

* * * * * * *

Commissions, brokerage, and other charges due or to become due to agents or brokers on policies issued on or after October 1, 1908	$150,859.38
State, county, and municipal taxes due or accrued	49,996.54

(State Report.)

1909.

Maryland Casualty Co. of Baltimore, Md.

* * * * * * *

Liabilities.

* * * * * * *

Commissions, brokerage, and other charges due or to become due to agents or brokers on policies issued on or after October 1, 1909	$172,907.47
State, county, and municipal taxes due or accrued	66,486.89

(State Report.)

1910.

Maryland Casualty Co. of Baltimore, Md.

* * * * * * *

Liabilities.

* * * * * * *

Commissions, brokerage, and other charges due or to become due to agents or brokers on policies issued on or after October 1, 1910	$202,146.95
State, county, and municipal taxes due or accrued	75,846.28

(State Report.)

1911.

Maryland Casualty Co. of Baltimore, Md.

* * * * * * *

Liabilities.

* * * * * * *

Net unpaid claims (except liability claims) . . . $295,031.96

(State Report.)

1913.

Maryland Casualty Co. of Baltimore, Md.

* * * * * * *

Assets.

* * * * * * *

Total premiums in course of collection. $1,140,370.29

Testimony of William S. Hall, a Witness Produced and Sworn on Behalf of the Defendants, Appearing upon Pages 156 *and* 157 *of the Record of the Court of Claims.*

"Cross-examination.

"By Mr. Serven:

"2 Cross-question. How would you determine for the year 1913, as shown at page 45 of the record, what the income from premiums of this company was for 1913?

"Answer. The item reads, 'Total net premiums received, $6,185,482.05.'

"3 Cross-question. I understood you to say that this amount represents the net premiums written for 1913?

"Answer. Yes, sir.

"4 Cross-question. State, if you can, how you would determine the cash premiums received in 1913.

"Answer. The cash premiums received in 1913 would be that sum less the total premiums in course of collection, amounting to $1,140,370.29, as shown in the ledger assets (p. 47 of the record), plus the total premiums in course of collection at the end of 1912, which amounted to $1,020,616.32 (p. 44 of the record)."

UNDISPUTED EVIDENCE SUPPORTING THE V REQUEST FOR ADDITIONAL FINDING OF FACT.

Testimony of James H. Patton, a Witness Produced and Sworn on Behalf of the Appellant, Court of Claims Record, Page 444.

"Cross-examination.

"By Mr. Anderson:

"2 Cross-question. Mr. Patton, I hand you here copy of your contract with the general agents of your company, which you furnished me, and which, I believe, was in force during the time the premiums were written which are in controversy in this case, and I ask you to examine it. Is that the contract that you furnished them?

"Answer. It is a photostatic copy.

"Mr. Anderson: I offer this copy of the contract in evidence, and ask the notary to mark it 'Defendants' Exhibit J. H. P. No. 1.' "

DEFENDANTS' EXHIBIT J. H. P. No. 1.

The agent will please note particularly the following items: Commissions on excess pay-roll premiums; the collection and remittance of premiums; the return of "not taken" policies; and the condition governing the payment of contingent commissions. All these will be strictly adhered to.

This agreement, made and entered into this 18th day of July, 1908, by and between the Maryland Casualty Company, hereinafter designated the company, a corporation organized and existing under the laws of the State of Maryland, party of the first part, and Louis K. Cleaveland, of Moline, Illinois, trading as L. K. Cleaveland & Co., hereinafter designated the agent, party of the second part, witnesseth:

That upon the terms and conditions, and in consideration of the several covenants and agreements to be kept and performed by the agent, hereinafter set forth, the company has this day appointed and does by these presents make, constitute, and appoint said party of the second part general agent of the company for the procuring of business for the company in the following-described territory, that is to say: City of Moline and vicinity, in the State of Illinois.

In consideration of and as full compensation for all services rendered and disbursements made by him under and pursuant to this contract the company agrees to allow to the agent commissions on all premiums by him, the agent, collected upon policies of insurance procured by the agent, of the classes of kinds included in this contract with the company, to wit: Personal, accident, and health, which commissions may be deducted by the agent from said premium collected by him at the following rates or percentages thereon, respectively, that is to say:

1. (*a*) On all original premiums for insurance procured and collected by the agent a commission of (30%) thirty per cent, except as follows:

(*b*) On premiums for ——— insurance a commission of (—%) ——— per cent.

(*c*) On premiums for ——— insurance a commission of (—%) ——— per cent.

(*d*) On premiums for ——— insurance a commission of (—%) ——— per cent.

2. On excess pay-roll premiums, as follows:

(*a*) The agent shall be allowed sixty days from date of expiration to secure pay-roll statements.

(*b*) When the agent has so procured a statement disclosing an excess of wage expenditure over the estimate shown in the policy, a further period of thirty days will be allowed to the agent to collect the additional premium, such thirty days to run from the date of the pay-roll statement so procured. If the agent fail to collect within this period the company will assume charge of the collection. On any additional premium thereafter collected the agent will be paid one-half of his usual commission.

(*c*) If the agent does not secure a pay-roll statement within sixty days from the expiration of the policy, the company will take up with the assured direct the matter of a correct statement of wages expended, and will itself endeavor to collect the additional premium found to be due. One-quarter of the commission will be allowed to the agent on any additional premium so determined and collected.

(*d*) The company reserves the right to audit all pay-roll accounts. If the agent has sent in a pay-roll certificate showing an additional premium due and has or has not collected such premium, or if the agent has reported a return premium, the company, upon finding an additional premium due over that found by the agent, if any, will collect what is due, and upon such excess (the excess found due by the company over and above that found due by the agent) will not pay the agent any commission whatever. But if the agent puts the company in possession of information of a positive character that the pay-roll statement secured by him is inadequate, and thereafter the company secures an additional premium, one-quarter of the regular commission will be allowed.

(*e*) Pay rolls and commissions on the same will be dealt with according to these rules whether the business is direct business or has come through subagents or brokers, and the agent must arrange accordingly with subagents and brokers.

(*f*) Nothing contained in these rules shall be held to waive the right of the company to collect from the agent the full commission on any return premium paid by it or by the agent.

(*g*) In the event of the termination of this contract, either by cancellation or otherwise, no commission will be paid the agent on any excess premiums ascertained thereafter, nor will any commission on premiums returned thereafter be demanded of him by the company; but the duty of the agent to obtain pay-roll reports, and his interest in the same, shall immediately cease.

3. If the agent shall have, in all regards, and particularly in the matters of the collection and remittance of premiums, and the return of "not taken" policies, fully complied with the conditions of this contract, he shall be entitled, to contingent commissions as follows:

Contingent Commissions.

On the net profits of the agency hereby agreed to there shall be a commission paid to the agent by the company in the following manner: On March 1st of each calendar year, or as soon thereafter as possible, an accounting shall be made up at the home office of the company, in which shall be credited the net premiums earned (after deducting cancellations and reinsurance reserve as of the preceding December 31st) on all business written by or through the agent during the preceding calendar year, which shall have been paid for by him prior to the said March 1st; there shall also be credited, in each of said annual accountings, after the first of said accountings, the amount of the reinsurance reserve deducted in the next preceding accounting; and there shall be charged in each of said accountings the following items, viz:

(*a*) All commissions paid to or retained by the agent on all business written by or through him during the preceding calendar year.

(*b*) All taxes, licenses, or other charges or fees paid or due by the company on business transacted in the agent's territory.

(*c*) The cost of all supplies furnished to the agent by the company.

(*d*) All cash items expended for account of the agent or his agency, *e. g.*, telegrams, expressage, special advertising, etc.

(*e*) Such proportion of the home office expenses as the agent's business during the preceding calendar year shall bear to the total business written by the company in said year.

(*f*) The cost of making inspections in the agent's territory during the preceding calendar year.

(*g*) All losses and loss expenses (legal and medical fees, investigating expenses, etc.) paid to date of accounting, and not previously debited in such accounting on business written at any time by the agent.

(*h*) The debit balance, if any, that may have appeared on the next preceding annual accounting.

On the credit balance or net profit remaining on each such annual accounting the company shall forward to the agent its check for a sum equal to a commission of 5 per cent of same.

In the event of the termination of this contract, either by cancellation or otherwise, no contingent commission or commission on profits will be paid the agent: except, that if such termination occur after December 31st of any year, and prior to the accounting and settlement for the said year as hereinbefore provided for, such accounting and settlement for the said year shall be made notwithstanding the termination of this contract.

This contract is made upon the following terms and conditions, and in consideration of the following covenants and agreements, to be kept and performed by said parties, respectively; that is to say:

Said company shall from time to time furnish the agent, for the purpose aforesaid, with such forms of policies of insurance and such manuals as may be requisite in the judgment of the company for the use of the agent in securing business and procuring the issue of policies of insurance such as herein contemplated, together with policy registers and books of account, pertaining to the business of the company, in which by the agent, shall be faithfully and correctly entered, written and recorded all transactions or matters connected with the business of the company occurring within the territory named in this contract and transacted by the agent. And the company will furnish such other documents and supplies as it or its officers shall deem necessary for the proper transaction by the agent of the business of the company within said territory, provided that all forms of policies, manuals, books of account, and other documents furnished by the company to the agent, as well as all letters and applications received, records and other documents and papers, or copies of same, relating to the business of the company are and shall be and remain the property of the company, and shall be delivered to the company or its duly authorized agent by the agent, party of the second part herein, his agents, employees or legal representatives, on demand therefor by the company, or any officer or authorized agent thereof.

The agent shall, and hereby agrees that he will, during the entire term of the agency hereby created, use the utmost diligence and give his best efforts to the procuring of business and writing and issuing policies of insurance on behalf and for the benefit of the company, at the rates and on the terms authorized in the manual or manuals to be furnished him by the company, and to the prompt collection of and remittance for all premiums payable for such insurance.

The agent shall, and hereby agrees that he will, issue policies of insurance furnished him for that purpose by the company only in the order of the numbers stamped on such policies in his possession, and shall and will keep a true and complete record of all policies of insurance issued by him on behalf of the company, and shall and will keep, in proper and customary form, true, complete and correct books of account showing all premiums collected by him for the company, all of which records, books, and accounts shall at all times be subject to full and convenient inspection by the company, its officers and authorized agents, whenever required.

The agent and all subagents employed by him in and for said business shall make, and the agent hereby, for himself and for his subagents, respectively, agrees that he will make to the company, from day to day during the said term a true and complete daily report of all policies issued in the name or behalf of the company by the agent, or any of his subagents, such report to be made and forwarded to the company on the day when such policy or policies shall be issued.

The agent shall, whenever possible, collect on delivery of each policy the premium for the same, but may extend to policyholders of reputed sound financial condition a credit not to exceed thirty days from date of policy.

The agent shall, immediately upon the expiration of the said credit limit to thirty days, cancel such policies as have not been paid for, taking up the same and forwarding them to the home office of the company with his next monthly statement; in advising the policyholder of cancellation he shall state that such action is taken because of nonpayment of premium, and shall simultaneously notify the home office to that effect.

The agent shall, and hereby agrees that he will, not later than the fifth of each calendar month during the term of the agency hereby created, render to the company a true and complete statement, in form such as the company may require, showing the number, description of, amount insured by, and the premium on each policy written or issued by or by the authority of the agent during the preceding calendar month; and he further agrees that he will on the fifth day of each calendar month pay or remit to the company in cash or its equivalent the balance due the company as shown by the last preceding monthly statement rendered to the company; and he also agrees that, in addition to the *said balance*, he will include in each remittance to the company *all moneys collected by him* for account of *additional premiums* on *excess pay rolls*, rendering to the company a detailed statement of said additional premiums with each remittance.

It is further understood and agreed that the agent will pay on demand, out of any funds collected by him for account of premiums and not remitted to the company, such drafts as may be drawn upon him by the company or its authorized representative for the purpose of settling claims, deducting same from his next succeeding monthly remittance.

The agent shall not, and hereby undertakes that he will not, issue or agree to issue, any policies of insurance written by or in the name or behalf of the company at any rate less than the rate of premium prescribed for the kind or class of insurance written in such policy by the rules and manuals furnished by the company to the agent, as herein provided for, except in such cases and to such extent as expressly authorized by the company in writing.

It shall also be the duty of the agent, and he hereby agrees, to furnish from time to time to persons holding policies issued by the company all such proper forms as may be furnished by the company for use by the assured in connection with the business of the company with said assured; and the agent further agrees and undertakes that from time to time, and at all times during the agency hereby created, upon receiving notice of any accident or casualty in respect of which any claim might be made against the company under any policy issued by it, or upon receiving notice of any such claim, he will forthwith transmit such notice and all information obtainable by him in respect of such accident, casualty, or claim to the company, at its general office in the city of Baltimore, or to such representative of the company as the home office may designate; and further, that whenever so directed by the company, or any officer, or any authorized agent thereof, he will also forthwith obtain and transmit to the company the statements of witnesses, reports of inspectors, and agents, and all other information obtainable by him which may be required by or advantageous to the company in respect of such accident, casualty, or claim, and will give all aid in his power in and about the investigation and adjustment of claims arising under policies issued by the company; all these duties to be performed by the agent without any other charge to the company than the actual traveling and incidental expenses necessarily incurred by the agent in fulfilling the same.

The agent further agrees that in case any policy written or procured by or through him upon or for which the agent shall have received or been credited with a commission shall thereafter be cancelled by the assured or by the company for any cause whatever, the agent shall and will pay to the company a return commission or percentage upon the return premium, if any, paid by the company upon such cancelled policy at the same rate or percentage as the commission which was received or credited to the agent upon the premium originally received for said policy. However, the agent shall not return, and the company will not credit to the agent any "not taken" policies unless received at the home office within thirty days from date of issue. Should a policy be declined by assured or returned as "not taken," more than thirty days after date of issue, the earned premium from date of policy must be collected and remitted to the company according to the table of short rates.

It is expressly understood that the agent shall, and he hereby agrees to, bear and pay all expenses and disubrsements of any and every kind, including postage, telegrams, and expressage, incurred in or required for the proper conduct of the agency hereby created and the faithful and diligent management of the business growing out of or connected with the same, except taxes (not including agents' licenses), payable by the company, and cost of supplies furnished by the company as above provided for; and further, that the agent is and shall be accountable to the company for the safe custody and for the delivery, without alteration or unauthorized indorsement thereon, to the persons entitled thereto, and none others, of all blank policies, forms of policies, and executed policies issued or delivered to the agent by the company, its officers or agents, and shall be liable to the company for any loss or damage resulting from any neglect or breach of duty on the part of the agent or his sub-agent or employees in respect thereof.

It is expressly understood and agreed that the agent is and shall be directly accountable to, and shall and will on demand therefor, at all times account to and with the company for all moneys, premiums, policies, supplies, documents, or other property belonging to the company, or for or in respect of which it may from time to time be entitled to an account under the provisions of this contract, and shall be directly liable to the company for and in respect to all acts, doings, and agreements of any and all solicitors, agents, special agents, canvassers, clerks, and other employees appointed or employed by the agent, in or about the transaction of said business; but all salaries, commissions, and compensation of any kind earned by or which may become payable to such solicitors, agents, special agents, canvassers, clerks, or employees, or any of them, shall be paid by the agent, and the company shall under no circumstances nor in any manner be liable for the same or any part thereof; however, such sub-agents, subordinates, and employees shall be subject always to such rules and regulations as may be prescribed by the company.

The agent shall not, and he undertakes and agrees that he will not, so long as this agreement shall remain in force, directly or indirectly act as an agent for or accept employment from any other corporation, partnership, or individual who may in any manner compete with said company in the business of insurance carried on by it, and that he, the agent, will not directly or indirectly, in any way do, or suffer to be done, any act or thing which shall or may in any way diminish or interfere with the profitable conduct of said business by the company.

It is further understood and agreed that the company reserves the right to detach from the agency of the party of the second part any portion or portions of the territory named herein, and also to terminate his agency as to any class or classes of insurance named herein, and to appoint another agent, or agents, in his stead for such detached territory or for such class or classes of insurance for which his agency may have been terminated.

It is also expressly understood and agreed by and between the parties hereto that the appointment by the company of said party of the second part as its general agent is made and shall continue in force only upon condition that the agent shall diligently and faithfully fulfill all and singular the terms, conditions, and agreements on his part herein set forth, and in case of any default, failure, or neglect on the part of the agent in all things to comply with and fulfill the same, then and in any such case the company shall have the right without further demand or notice to cancel this contract and terminate the agency hereby created.

It is also agreed that either party shall have the right to cancel this contract at any time upon giving to the other party thirty days' notice of its or his intention to cancel and terminate the same and whenever any such notice shall be given then at the end of thirty days thereafter all power and authority of said agent to represent or in any manner bind said company shall cease and be revoked without further act to be done by said company.

Upon the termination of said agency hereby created, whether by limitation of time, cancellation of this contract, or otherwise, the said party of the second part agrees that he will not thereafter write any new insurance or undertake to transact any new business in the name or behalf of the company or do any act or thing obligating or purporting to obligate the company to do or refrain from doing any act or thing whatsoever, and upon such termination of said agency all property of the company, including any and all certificate or other evidence of authority given by the company to the agent then in the possession or under the control of the agent shall be forthwith returned and delivered to the company, its officers, or authorized agents.

It is a further express condition of this contract that the agent shall, and he hereby agrees that he will, within thirty days from the date hereof deliver to said company at its general office in the city of Baltimore, Maryland, a bond in the penal sum of ($1,000.00) one thousand dollars, duly executed by the agent and by such surety company and containing such conditions for the payment of said penal sum to said party of the first part as obligee therein as shall be satisfactory to and approved by the said company; provided, that if within thirty days from the date hereof a bond in amount and upon conditions such as above provided for and executed as aforesaid shall not be tendered to said party of the first part, at its general office in the city of Baltimore, by or on behalf of the agent, then the company shall have the right and option at any time thereafter to cancel this contract by notice thereof in writing, given or mailed to said agent by the said company, and the giving of such notice, either by delivering the same at the usual place of business of the agent or by depositing the same in the Baltimore post office, postage prepaid, and directed to his business address, shall revoke and annul all powers herein granted to the agent and shall release the company from all obligations hereunder.

In witness whereof the company has executed these presents by its president and the agent has hereunto set his hand and seal as of the day and year hereinbefore first written.

MARYLAND CASUALTY COMPANY,
By JNO. T. STONE, *President*.

Witness:
V. J. NORTH.

[SEAL.] LOUIS K. CLEAVELAND.

Contract of L. K. Cleaveland & Co., agent at Moline, Ill., with Maryland Casualty Company. Dated July 18th, 1908.

IN THE COURT OF CLAIMS OF THE UNITED STATES.

No. 33191.

THE MARYLAND CASUALTY COMPANY

v.

THE UNITED STATES.

Claimant's Motion to Amend Findings.

(Filed March 14, 1917.)

Now comes the claimant and moves the court to amend its findings filed on February 12, 1917, as follows:

I.

To amend Finding III, by inserting as a paragraph on page 3, between the first and second paragraphs thereof, the following:

> The books of the claimant company showed net addition to reserve funds, in addition to those reported in its original tax return for 1909, made up of the following increases in liabilities, in brokerage, etc., $22,048.09, and in taxes, $16,490.35.

II.

To amend Finding IV by inserting as a paragraph, between paragraphs one and two on page 6, the following:

> The books of the claimant company showed net addition to reserve funds, in addition to those reported in its original tax return for 1910, made up of

the following increases in liabilities, in brokerage $42,389.46, and in unpaid salaries $15,846.28, instead of $15,295.14, as stated in said return.

III.

To amend Finding VII, page 16, by adding at the end thereof, as a paragraph, the following:

> There were at the end of the calendar year, 1913, premiums in course of collection by agents amounting to $1,140,370.29.

IV.

To amend the findings of the court by attaching thereto as an appendix a copy of the contract between the company and its general agents herewith exhibited to the court.

A. R. **Serven**,
Attorney for Claimant.

No objection.

Huston Thompson,
Assistant Attorney General J. W. T.

Statement.

The amendments to the Findings proposed in Numbers I, II, and III, of this motion are requested for the reason that Counsel for Claimant understood and believed that they were included in the agreed requests for Findings of Fact and also understands that Counsel for Defendant also understood that they were likewise included therein. Claimant's counsel distinctly recalls the insertion of some of the figures contained in these amendments as a correction to the printer's proofs of the requests for Findings of Fact and is under the impression that all of said proposed figures were included in such corrections. It is respectfully submitted, in view of the character of the questions involved in this cause and of the understanding that these figures would be contained in the Findings of Fact to be made by this court in order that all facts relevant and material to the questions involved in this cause might be contained therein, that the Findings should be amended to include the statements and figures contained in the first three amendments as proposed by said motion.

Owing to the fact that this court has held that premiums paid to any agent of the Claimant's, whether shown by its books or not should be included in the computation of Claimant's gross income for its tax returns, it is respectfully submitted that the Findings herein should be supplemented by a copy of Claimant's contract with its said agents in order that the exact situation as to the Claimant's relations with its said agents should be fully disclosed by the Findings of Fact. Therefore claimant urges the allowance of proposition IV of the above motion that a copy of its contract with its agents, as herewith submitted, may be made an appendix to the facts as found by this Honorable Court.

(Accompanying this motion was the contract marked "Defendants' Exhibit J. H. P. No. 1," set forth in the evidence hereinbefore set forth.)

IN THE COURT OF CLAIMS OF THE UNITED STATES.

No. 33191.

Maryland Casualty Company, a Corporation,

v.

The United States.

Motion.

(Filed September 28, 1917.)

Comes now the claimant by its attorneys and moves this Honorable Court for leave to file a motion to amend the Findings of Fact in the above entitled cause by including therein a finding of the amount of claimant's premiums remaining uncollected at the close of business on December 31, 1913, $1,140,370.29; the amount of claimant's reserve fund required by law for loss claims, except for liability losses for 1911, $295,031.96; and the net additions over preceding years to the miscellaneous reserve funds, maintained by claimant for the years 1909 and 1910, not heretofore found.

Respectfully submitted,

Serven & Joyce,
Attorneys for Claimant.

Statement.

Claimant's counsel profoundly disclaim any desire to take any action in the above-entitled cause which will not meet the entire approval of this Honorable Court, but after mature consideration of the questions involved in this cause, in connection with the facts developed by the testimony offered under the order entered in pursuance of the supplemental opinion rendered herein on April 2, 1917, have concluded that it is an obligation due to both this court and to the claimant to suggest that certain omissions from the Findings of Fact as agreed to with the counsel for the defendants, should be called to the attention of the court.

After careful deliberation and consultation upon the matter it would seem that the court might with propriety, exercise its plenary power to add to the findings as prepared by the counsel for the parties hereto, by including therein, any additional facts that may seem to be relevant and material to the final determination of all the questions involved in this proceeding, especially as it constitutes a test case for the construction of taxing acts which are relatively new in the national revenue system.

Claimant's counsel therefore beg the indulgence of the court for the suggestion that the findings may include at some appropriate point, a statement of the amount of claimant's uncollected premiums at the close of business on December 31, 1913, amounting to $1,140,370.29, as disclosed by the record, pages 47 and elsewhere.

It is also suggested that as the court has held that claimant was required by law for the first time in 1911, to maintain a reserve for loss claims not including liability loss claims, the findings might contain at some appropriate point a statement showing the amount of reserve for loss claims other than liability claims, thus for the first time required by law for 1911, amounting to $295,031.96, as disclosed at page 42 of the record, as it would appear that the findings of fact as agreed to by counsel herein were in error as to the amount of the net addition to the reserve funds required by law for that year over the amount of reserve funds required by law for the preceding year.

As this cause involves the final determination of the question whether claimant and other similar companies subject to the provisions of the tax acts referred to herein were required by law to maintain reserves for all unsettled liabilities, claimant's counsel beg to express the hope that the court may find it material to add to the findings at some appropriate point, so as to indicate that claimant's books showed net additions to reserve funds in addition to those found for the years 1909 and 1910, as follows: For 1909, brokerage, etc., $22,048.09; and for taxes, $16,490.35. For 1910, brokerage, etc., $42,389.46; and for unpaid salaries, $15,846.28, instead of $15,295.14 (record pages 196 and 12).

This motion is presented to the court after much hesitation and extended conference and discussion of its propriety and desirability. It is believed that all of the matters herein referred to should be brought to the attention of the court at this time and that counsel for claimant would fail to perform their full duty to this Honorable Court and to the claimant if this motion were not now presented.

Respectfully submitted on behalf of the claimant's counsel in this cause.

SERVEN & JOYCE,
Attorneys for Claimant.

(The following motion accompanied the preceding motion at the time the latter was filed.)

IN THE COURT OF CLAIMS OF THE UNITED STATES.

No. 33191.

The Maryland Casualty Company, a Corporation,

v.

The United States.

Motion.

(Presented to Court, but not Filed, September 28, 1917.)

Comes now the claimant by its attorneys and moves this Honorable Court that the Findings of Fact heretofore found in the above entitled cause, be amended by adding thereto an additional section, as follows:

XV.

Claimant's books show that the net addition to reserve funds maintained by it as required by various State Insurance Departments in addition to those above found included, for brokerage, etc., $22,048.09, and for taxes, $16,490.35 for 1909, and for brokerage, etc., $42,389.46, and for unpaid salaries, $551.14 for 1910, (E., p. 12, S. XVIII, p. 196, Q. 4).

The total amount of reserve funds maintained by claimant as required by various State Insurance Departments, for unsettled loss claims other than liability losses, for 1910 was $215,924.14 (R., p. 40), and the total amount of reserve funds maintained by claimant as required by law for unsettled loss claims other than liability losses for 1911 was $295,031.96 (R., p. 42). The total amount of claimant's premium income for 1909 was $3,849,797.85; for 1910 $4,363,000.14; for 1911 $4,907,972.48; for 1912 $5,695,874.91, and for 1913 $6,065,728.08, (R., pp. 442-3, Q. 2). The total amount of premiums uncollected and in course of collection on December 31, of each of the years from 1908 to 1913, inclusive, was as follows: For 1908, $584,164.18; for 1909, $643,162.08; for 1910, $768,917.62; for 1911, $892,755.17; for 1912, $1,020,616.32; and for 1913, $1,140,370.29 (R., pp. 35, 37, 39, 42, 44, 47).

Respectfully submitted,

SERVEN & JOYCE,
Attorneys for Claimant.

Statement.

This motion is intended to accompany the motion for leave to file a motion to amend the Findings of Fact heretofore found in the above entitled cause in order that every fact material and relevant to the issues therein involved may be determined and fully shown in the facts as found by this Honorable Court. While some of the facts herein requested to be found, may not be considered necessary to the computation of the judgment under the opinions of this Honorable Court, it is respectfully submitted that all of them should have a place in the Findings of Fact for such consideration as they may be entitled to should this case be taken up on appeal.

As the present case at bar constitutes a test case for the purpose of determining many of the various questions involved in the Federal Taxation of a large number of Insurance Companies, it would seem to be highly desirable that the matters to which these additional facts may relate may be fully considered and finally determined if possible in the case at bar instead of necessitating the bringing of further cases for that purpose.

Respectfully submitted,

SERVEN & JOYCE,
Attorneys for Claimant.

(NOTE.—The following are the material parts of an extended motion for new trial filed herein, Jan. 30, 1918:)

IN THE COURT OF CLAIMS OF THE UNITED STATES.

No. 33191.

MARYLAND CASUALTY COMPANY, a Corporation,

vs.

THE UNITED STATES.

Motion for New Trial.

Comes now the claimant by its attorneys and moves this Honorable Court that the judgment heretofore entered in the above-entitled cause be set aside and a new trial granted, and that the findings of fact heretofore made by the Court be supplemented by such additional findings, if any, as to the Court may seem proper, on the following assignments of error, as grounds therefor.

Errors of Fact.

I.

The Court erred in omitting to find for the year 1909 that the claimant's books showed that the net addition to reserve funds maintained by it as required by various State insurance departments in administering the statutes of said States, in addition to those found, included brokerage, etc., $22,048.09, and for taxes, $16,490.35 (R., p. 12, S. XVIII, p. 196, Q. 4).

II.

The Court erred in omitting to find for the year 1910 that the claimant's books showed that the net additions to reserve funds maintained by it as required by various State insurance departments in administering the statutes of said States, in addition to those found, included for brokerage, etc., $42,389.46, and for unpaid salaries, $551.14 (R., p. 12, S. XVIII, p. 196, Q. 4).

III.

The Court erred in omitting to find that claimant's books showed the total amount of reserve funds maintained by claimant as required by various State insurance departments in administering the statutes of said States for unsettled loss claims other than liability losses, to be $215,924.14 for the year 1910 (R., p. 40); that the total amount of reserve funds required by law for 1910 amounted to $3,071,821.74, which included $2,108,696.06 for unearned premiums and $963,125.68 for unsettled liability losses (R., p. 40); that the total amount of reserve funds required by law for 1911 amounted to $3,618,579.18, which included $2,355,732.22 for unearned premiums and $967,815.00 for unsettled liability losses and $295,031.96 for unsettled loss claims (R., p. 42); and that the net addition to the reserve funds required by law for 1911 amounted to $546,757.44.

IV.

The Court erred in omitting to find that the claimant's total income from premiums received for 1909 was $3,849,797.85; for 1910, $4,363,000.14; for 1911, $4,907,972.48; for 1912, $5,695,874.91, and for 1913, $6,065,728.08 (R., pp. 442-3, Q. 2, 448, Q. 17-22), and that the total amount of premiums remaining uncollected at the end of each of the following years, was, for 1908, $584,164.18; for 1909, $643,162.08; for 1910, $768,917.62; for 1911, $892,755.17; for 1912, $1,020,616.32, and for 1913, $1,140,370.29 (R., pp. 35, 37, 39, 42, 44, 47, 448, Q. 17-22).

Errors of Law.

* * * * * * *

Claimant's Request for Additional Findings of Fact.

The claimant, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this cause in the findings of fact, requests the Court to find the same as follows:

XV.

Claimant's books showed that the net additions to reserve funds maintained by it as required by various State insurance departments in administering the statutes of said States, in addition to those heretofore found, included, for the year 1909, $22,048.09 for brokerage, etc., and $16,490.35 for taxes, and for 1910, $42,389.46 for brokerage, etc., and $551.14 for unpaid salaries (R., p. 12, S. XVIII, p. 196, Q. 4, Findings III and IV of Court). For 1910 the reserve so maintained for unsettled loss claims other than liability claims was $215,924.14 (R., p. 40), and the total amount of reserve funds required by law was $3,071,821.74, consisting of $2,108,696.06 for unearned premiums and $963,125.68 for unsettled liability losses (R., p. 40). The total amount of reserve funds required by law for 1911 amounted to $3,618,579.18, including $2,355,732.22 for unearned premiums, $967,815.00 for unsettled liability losses, and $295,031.96 for other unsettled loss claims (R., p. 42).

The net addition to reserve funds required by law for 1911 over 1910 amounted to $546,757.44.

XVI.

Claimant's total income from premiums received was, for 1909, $3,849,797.85; for 1910, $4,363,000.14; for 1911, $4,907,972.48; for 1912, $5,695,874.91, and for 1913, $6,065,728.08 (R., pp. 442-3, Q. 2; 448, Q. 17-22). The total amount of premiums remaining uncollected at the end of each of the following years was, for 1908, $584,164.18; for 1909, $643,162.08; for 1910, $768,917.62; for 1911, $892,755.17; for 1912, $1,020,616.32, and for 1913, $1,140,370.29 (R., pp. 35, 37, 39, 42, 44, 47, 448, Q. 17-22).

Conclusion of Law.

Upon the above findings of fact the court decides as a conclusion of law that claimant is entitled to recover from the defendants the full sum of $9,394.09.

* * * * * * *

Respectfully submitted,

SERVEN & JOYCE.

AFFIDAVIT OF COUNSEL.

DISTRICT OF COLUMBIA, *ss:*

ABRAM R. SERVEN, being duly sworn, deposes and says that he was attorney for appellant in the Court of Claims, prepared the pleadings therein, and is familiar with the evidence taken therein; that the testimony of James H. Patton set forth herein, as appearing on pages 196, 31, 32, and 444 of the Court of Claims record, is a true copy of such testimony as it appears in such record; that the items hereinbefore set forth as appearing in the State Reports of the State of Maryland for the years 1908, 1909, 1910, 1911, and 1913 are true copies of such items as they appear in the record of the Court of Claims on pages 35, 37, 40, 42, and 47; that the testimony of William S. Hall hereinbefore set forth, as appearing on pages 156 and 157 of the Court of Claims record, is a true copy of such testimony as it appears in such record; that the contract hereinbefore set forth as being "Defendants' Exhibit J. H. P. #1" is a true copy of such exhibit appearing in the Court of Claims record.

That "Claimant's motion to amend findings," filed March 14, 1917, and Claimant's motion for leave to file a motion to amend findings," filed September 28, 1917, and the motion to amend findings accompanying said motion hereinbefore set forth, are true copies of such motions, and that those parts of the "Motion for a new trial" hereinbefore set forth are true copies of such parts of the motion for new trial filed herein in the Court of Claims, filed January 30, 1918; and further deponent saith not.

ABRAM R. SERVEN.

Subscribed and sworn to before me this 4th day of June, 1919.

[SEAL.]

W. B. JAYNES,
Notary Public.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

MARYLAND CASUALTY COMPANY, APPELLANT,
v.
THE UNITED STATES.
} No. 73.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

This case comes from the Court of Claims and is a suit to recover taxes paid under protest for the years 1909, 1910, 1911, 1912, and 1913. The court dismissed the petition.

STATUTES INVOLVED.

The taxes for 1909, 1910, 1911, and 1912 were collected under the act of August 5, 1909 (36 Stat., c. 6, p. 112), which levied an annual excise tax on corporations "equivalent to one per centum upon the entire net income over and above five thousand dollars received," during each year from all sources. Those for 1913 were collected under the revenue act of 1913 (38 Stat., c. 16, pp. 114, 166), which superseded the act of 1909 and provided for an excise tax equivalent to 1 per centum of the net income of corporations for the first two months of that year and an income tax of 1 per centum upon the net income arising or accruing during the remaining 10 months of the year. Both acts provided for certain deductions to be made from the gross income, including, among other things not necessary to be mentioned, the following:

> In case of insurance companies the net addition, if any, required by law to be made within the year to reserve funds. (P. 173.)

HISTORY OF THE CASE.

The appellant is an insurance company under the laws of Maryland, with its home office at Baltimore. For the years mentioned it made returns of its income, and, upon these returns, paid a tax for 1909 of $2,823.20, for 1910 of $2,212.11, for 1911 of $2,644.45, and for 1912 of $276.54, in all, $7,956.30, the payments being made, under protest, in June, 1910, June, 1911, June, 1912, and June, 1913, respectively. Its return for 1913 showed no net income and it paid no taxes.

Subsequently, on an examination of appellant's books, the Commissioner of Internal Revenue caused amended returns to be filed, on which new assessments were made for each of the years in question. On the new assessment for each year there was credited the amount previously paid for that year and appellant paid, under protest, additional amounts as follows: For 1909, $838.12, and $58.67 interest;

for 1910, $1,191.64; for 1911, $2,613.50; for 1912, $1,990.39; and for 1913, $1,657.54. The additional payments made thus aggregated $8,349.86. The additional payment for 1909 was made November 13, 1913; that for 1910, 1911, and 1912, August 11, 1914; and that for 1913, December 7, 1914. The new assessment for 1909 was made after appellant had been notified that it was proposed to be made and had filed an abatement claim, which was considered and in part allowed.

On August 14, 1914, appellant filed a claim for refund of the additional taxes for 1909, 1910, 1911, and 1912. On April 30, 1915, it filed a claim for $14,648.62, total taxes and interest for the years 1909 to 1912, setting out a specific claim for the refund of the additional excise taxes for the years 1909 to 1912, inclusive, followed by this general language: "The claimant also asks for the refund of all amounts paid by it as taxes which, through lack of information as to the requirements of the law or by error in computation, it may have paid in excess of the amounts legally due." In May, 1915, a claim was filed for the refund of the taxes paid for the year 1913.

More than six months having elapsed without a decision by the commissioner, this suit was commenced on February 8, 1916. Later, the claims were all rejected by the commissioner.

DIFFERENCES BETWEEN ORIGINAL RETURNS AND NEW ASSESSMENTS.

Except as will be noted later, the present claim of appellant rests on differences between the original returns made by it and the amended returns caused to be made by the commissioner. These differences relate solely to one item under the head of "Gross income" being "Net premium," and one item under the head of "Deductions" being "Net addition, if any, required by law to be made within the year to reserve funds." The other items making up the report are not in controversy and need not be mentioned.

1. Appellant construed the act of 1909 as requiring it to report, for each year, the income actually *received* during that year. Assuming that premiums were to be treated as income for the year in which received regardless of when the policies were written, its returns for the years 1909, 1910, 1911, and 1912 purported to report premiums on this plan.

Its business was written through agents located throughout the country. The contracts with these agents required them to collect premiums and to report once a month all collections, the report to be made not later than the 5th day of the month. The agents were permitted, however, to extend a credit of 30 days to persons taking policies within which to pay the premiums. If the premium was not paid within that time the agent was required to cancel and return the policy. At a given time, then, the premiums in the hands of an agent and unreported will consist of (1) cash collected since his last monthly report and (2) premiums as to which the period of credit has not expired.

Appellant in order to arrive at the amount of premiums *received* during a particular year added to the net amount of premiums written during that year the amount of premiums collected on policies written in the preceding year, and subtracted from the same the amount of premiums in the hands of agents at the end of the year in question whether collected by them or still held for collection.

On the other hand, the commissioner construed the act as requiring him to treat as income of a particular year all premiums on policies written during that year. He accordingly caused the returns to be made on this basis, neither adding premiums unreported at the close of the previous year nor deducting those unreported by the agents at the end of the year in question.

Appellant's original returns reported income from premiums as follows:

1909.

Net premiums written in 1909	$3,908,795.75	
Premiums in course of collection by agents unreported Dec. 31, 1908, and reported in 1909	584,164.18	
		4,492,959.93
Less premiums in course of collection by agents unreported Dec. 31, 1909		643,162.08
Total premiums received		3,849,797.85

1910.

Net premiums written in 1910	$4,488,755.68	
1909 premiums unreported Jan. 1, 1910	643,162.08	5,131,917.76
Less 1910 premiums unreported Dec. 31, 1910		768,917.62
Total premiums received		4,363,000.14

1911.

Net premiums written in 1911	$5,031,810.03	
1910 premiums unreported Jan. 1, 1911	768,917.62	5,800,727.65
Less 1911 premiums unreported Dec. 31, 1911		892,755.17
Total premiums received		4,907,972.48

1912.

Net premiums written in 1912	$5,823,736.06	
1911 premiums unreported Jan. 1, 1912	892,755.17	6,716,491.23
Less 1912 premiums unreported Dec. 31, 1912		1,020,616.32
Total premiums received		5,695,874.91

In making the new assessment for each of these years the commissioner treated as the income from premiums the item "net premiums written," without additions or deductions. The result was to increase "gross income" as returned by appellant as follows: For 1909, $58,999.90; for 1910, $125,755.54; for 1911, $123,837.55; and for 1912, $127,861.15.

As the act of 1913 imposed a tax on income "arising or accruing" during the year, both the appellant and the commissioner in the returns for 1913 treated "net premiums written" as the income from that source.

2. There was also an increase in taxes resulting from the difference between the original and amended returns with respect to the deductions made for additions to reserve funds.

Of the items claimed under this head in the original returns the commissioner in the amended returns allowed those denominated—

(*a*) *Reserve for unearned premiums.*

(*b*) *Special reserve for liability losses,* as follows:

	1909	1910	1911	1912
(*a*)	$205, 447. 85	$239, 560. 21	$247, 036. 16	$329, 532. 89
(*b*)	238, 734. 32	94, 010. 81	4, 689. 32	226, 420. 00
	444, 182. 17	333, 571. 02	251, 725. 48	555, 952. 89

For 1913 there was an increase in unearned premium reserve of $81,784.67, but a decrease in the special reserve for special liability reserve of $352,252. In the original returns this $352,252 was reported as income and a deduction made for the $81,784.67 and other items claimed as additions to reserve funds. The commissioner likewise treated the $352,252 as income and deducted the $81,784.67, but disallowed the other items claimed as deductions. The increase in taxes, therefore, came not from an increase in income—which, in fact, to correct an error, was reduced $18,621.73—but from a decrease in deductions allowed. The deductions claimed in the original returns but disallowed by the commissioner were:

1909.		
Unpaid losses		$14, 510. 99
1910.		
Unpaid losses	$52, 240. 81	
Unpaid taxes	9, 359. 39	
Unpaid salaries	15, 295. 14	
		76, 895. 34
Less decrease in reinsurance due other companies		906. 95
		75, 988. 39
1911.		
Unpaid losses	$79, 107. 82	
Unpaid taxes	9, 474. 86	
Unpaid brokerage, etc	25, 746. 97	
Unpaid reinsurance	1, 697. 38	
		116, 027. 03
Less decrease in unpaid salaries		7, 242. 37
		108, 784. 66
1912.		
Unpaid losses	$50, 754. 24	
Unpaid brokerage, etc	34, 522. 51	
Unpaid taxes	13, 938. 20	
Unpaid salaries	6, 585. 45	
Unpaid reinsurance	9, 038. 60	
		114, 839. 00
1913.		
Unpaid losses	$157, 800. 20	
Unpaid brokerage	14, 087. 64	
Unpaid taxes	6, 676. 31	
Unpaid salaries	3, 690. 83	
Unpaid reinsurance	2, 120. 37	
		184, 375. 35

OTHER CLAIMS OF APPELLANT.

While the foregoing statements show the full amounts of net income on which appellant was finally required to pay taxes in excess of the net income shown by its original return, it now asserts that it is entitled to recover the taxes paid on certain other amounts by reason of errors and omissions in these returns.

1. It claims that, under the head of additions to reserve funds, it omitted the following deductions which should have been made:

1909.	
Unpaid brokerage	$22, 048. 09
Unpaid taxes	16, 490. 35
	38, 538. 44
1910.	
Unpaid brokerage	42, 389. 46
Error in unpaid salaries	551. 14
	42, 940. 60
1911.	
Unpaid losses on policies other than employer's liability policies	215, 924. 14

2. It claims that the decrease in the special reserve for unpaid liability losses should not have been treated as income for 1913.

3. It claims that it erroneously reported as income for 1909, $584,164.18 of premiums collected in that year on policies written in 1908, because these premiums accrued before the effective date of the act of 1909, and that, eliminating this item of income, it had no taxable net income for that year.

RULING OF THE COURT OF CLAIMS.

The Court of Claims agreed with the Commissioner of Internal Revenue as to the deductions allowable on account of additions to reserve funds and held that appellant was not entitled to any recovery on that account.

The controversy between appellant and appellee as to whether the income from premiums was to be figured on the basis of premiums actually collected during the year or on premiums on policies written during the year was decided by the court in favor of the appellant. But it was held that premiums received during the year by the company's agents were received by the company, and hence that from the total amount of premiums written there could be deducted as uncollected only the amounts which had not been received *either by the company at its home office or by its agents.* The company had shown only the amounts which had not been received at the home office. These were very large for each year, but it appeared that many of the premiums included in them had actually been paid and were in the hands of the agents before the end of the year, though not reported to the home office. There had been no effort to show the amount of collections thus made by the agents. The court therefore held that no judgment could be rendered until these amounts were shown, so that it could be determined what amount of premiums were actually uncollected at the end of the year. The case was twice remanded to the rules for proof upon this point. Appellant produced no satisfactory evidence of the amounts actually uncollected at the end of any one of the years in question, and the court, declining to base a judgment upon a guess at these amounts, dismissed the petition.

MOTION TO REMAND FOR ADDITIONAL FINDINGS OF FACT.

The appellant has filed a motion in this court to remand the case for additional findings of fact, specifying seven facts which it asks to be found. These facts the Government agreed in the court below should be found and now agrees that they may be incorporated in the record and the following facts treated as thus established:

1. Appellant's increase in indebtedness for brokerage, commissions, etc., for the year 1909 over such indebtedness for 1908 was $22,048.09.

2. Appellant's increase in indebtedness for taxes for the year 1909 over such indebtedness for 1908 was $16,490.35.

3. Appellant's increase in indebtedness for brokerage, commissions, etc., for the year 1910 over such indebtedness for 1909 was $42,389.46.

4. Appellant's increase in indebtedness for unpaid salaries for the year 1910 over such indebtedness for 1909 was $15,846.28.

5. The contract printed on pages 20–29 of appellant's motion for order for findings of additional facts is the contract under which appellant's agents collected and remitted premiums from 1909 to 1913, inclusive.

6. The amount of appellant's premium income in course of collection by its agents and unremitted, though in part collected by them, for 1913 was $1,140,370.29.

7. The amount of unpaid claims for losses on policies other than employer's liability policies for the year 1911 was $295,031.96.

BRIEF.

I.

Appellant can, in any event, recover only such specific sums as it has shown were illegally included in the amount which it was required to pay on the basis of the final assessment. (*United States* v. *Rindskopf*, 105 U. S., 418, 422.)

II.

In reporting the amount of premiums each year appellant reported the amount of premiums written and then deducted what it claimed was the amount uncollected at the end of the year. But it included in the deduction premiums collected but not reported by its agents, the amount of which does not appear. There are, therefore, no facts in the record upon which a judgment for any amount could rest. (*Mutual Benefit Life Insurance Co.* v. *Herold*, 198 Fed. Rep., 199; *Crookston Bros.* v. *Furtado*, 5 Great Britain Tax Cases, 602.)

III.

Appellant claims that all the assets which it is required to possess as a condition precedent to doing business in any State are reserve funds within the meaning of the revenue act.

IV.

Reserve funds on account of which deductions are allowed are not funds held to pay ordinary, definite, and fixed liabilities, whether due or not, but only those funds estimated to be sufficient to meet the uncertain and undetermined liabilities which may be expected to result from the issuance of policies of insurance and which are required by law to be maintained for the protection of policyholders.

ARGUMENT.

While part of what appellant has paid, was paid on assessments of taxes based on its original returns, the amounts so paid were later credited on the tax assessments as finally made by the commissioner. What it was, in fact, required to pay, consisting of the original payments plus the additional payments, was therefore the aggregate amount of these final demands. If they were correct, it has, in the end, paid only what was legally due and is not entitled to recover regardless of whether there were errors in the original taxes assessed. It can in no event recover except for such amounts included in the total payments as it shows were illegally exacted. It is not sufficient to show that the final assessments were erroneous or based on an incorrect theory. The *amount* of the illegal exaction must be shown. (*United States* v. *Rindskopf*, 105 U. S. 418, 422.)

The claim as presented in the Court of Claims is divided into two parts:

1. A claim that for each year the tax was paid on certain amounts of premiums included in gross income which were not received within the year.

2. A claim that appellant was denied certain deductions on account of additions to reserve funds required by law.

If Appellant Was Required to Pay a Tax for Any Year on Premiums Not Received During That Year, It Failed to Show the Amount Thereof. Hence, There Were No Facts Upon Which a Judgment for Any Amount Could be Predicated and the Petition as to This Claim Was Properly Dismissed.

Since the full amount that appellant has paid is the amount called for by the assessments as finally made, the primary inquiry is whether those assessments were correct. If they did not require it to pay more than it was legally required to pay, it is not entitled to recover.

The only complaint made of the amount charged as "gross income" is that under the head of "net premiums received" there were included some premiums which were not received during the taxable year. The commissioner treated as "net premiums received" the net premiums on all policies written during the year and this included some premiums which were not received until the next year. The appellant contends that "net premiums received" are all premiums actually received during the year and include premiums on policies written in the preceding year and paid later, but exclude so much of the premiums on policies written during the taxable year as are not received until after that year.

The Court of Claims sustained appellant's contention, and in the state of the record it is unimportant whether this ruling is correct or erroneous. For purposes of argument, it will be assumed to be correct. On this assumption the assessments were erroneous and the result is that the commissioner has failed to include in "gross income," taking the year 1910 as an illustration, some premiums on policies written in 1909 which should have been included, but has included other premiums which were uncollected at the close of 1910, which should have been excluded. The difference between the items thus erroneously omitted and those erroneously included marks the extent to which the assessment was erroneous and also determines whether the error was prejudicial or beneficial to the appellant. If the improperly excluded 1909 premiums exceeded in amount the improperly included 1910 premiums, the error conferred a benefit. If the contrary was true the error was prejudicial. Appellant sought to establish that the error resulted in including an excessive amount, but contented itself with setting up as that amount the total of premiums which its agents had not reported to the home office as collected. Admittedly this total included not only premiums which had not been collected, but also premiums which had been paid to its agents, and thus converted into cash which the agents had received as and for the appellant and for which they were bound to account, and which paid the company's claim against the policyholder. The Court of Claims held, as the Government contended, that premiums paid to the agents during the year are received by the company within the meaning of the act whether remitted to the home office before or after the close of the year. This presents the only issue so far as the item of income from premiums is concerned.

It is frankly admitted in the brief for appellant that, as between the company and its policyholder, the receipt of the premium by the agent is the receipt by the company. It follows, therefore, that when a premium is paid to an authorized agent of the company it ceases to be in any sense an outstanding or uncollected premium. A premium, of course, is the amount which the policyholder owes for his policy. When it is paid, the policyholder no longer owes anything and the company has no claim of any kind against him. The company or its agent then has simply the proceeds of a collected premium.

The company is, of course, at liberty to adopt any measure it chooses for the collection of premiums which become due to it. It may require that the policyholder instead of paying the agent shall remit the premium direct to the home office. It may, if it sees fit, require its agent to accept in payment of premiums nothing except cash and to immediately upon receipt of this cash forward to the home office the precise bills and coin which it has received. It may, on the other hand, as was done in this case, give to its agent a broader authority in handling premiums collected, and, after requiring a bond for a faithful accounting, only require remittances at stated intervals, and may permit these remittances to be made by check covering all collections made since the last remittance. It may require all moneys collected to be immediately deposited in bank to the credit of the company or to the credit of the agent as agent. Or it may leave the agent free to deposit moneys collected or care for them as he sees proper, merely requiring remittances at the time stated. But no matter which of these methods is adopted, it is simply the method by which the company chooses to handle moneys which have been received in payment of premiums, which belong to it and which it has the right to control, and can have no application until premiums have actually been paid and received.

As long as the premium has not been paid by the policyholder, and may never be paid, it may very well be said not to be income received by the company. But when it has once been paid, and the obligation of the policyholder to the company fully discharged, it can not possibly be said that, so far as that policyholder is concerned, the company still has any outstanding or uncollected premium. The manner in which the company deals with the proceeds of a premium after it has been paid can not convert those proceeds back into an unreceived premium. If after the money is paid by the policyholder it is lost, through the default of an agent or officer of the company, there may be some head under which the company would be entitled to a credit in its report of taxable income, but this could not be under the head of "net premiums received." The point is that when the company permits its agent to retain possession for a certain period of moneys which he has collected in payment of premiums it is not dealing with uncollected premiums but with moneys which belong to it and which it has the right to control. At most, it has converted claims which it previously had against policyholders for premiums into a claim against the agent for moneys for which the latter is bound to account. On a "cash received" basis it is just as if it had loaned a part of the net income to a stranger. It may be that at the end of the year it has such claims or choses in action against its agents for moneys which they have collected in payment of premiums, but it is certain that these claims are not at the close of the year outstanding or uncollected premiums. The premiums have been paid, and in their place the company has its rights against the agents and the sureties on their bond. What the nature of these rights may be is wholly unimportant because they are not rights relating to premiums. They are rights which ordinarily have a money value equal to the premiums which have been collected. They represent money which will reach the treasury of the company unless the agent commits the crime of embezzlement or some other crime.

But the result in this case would not be changed if it should be admitted that in case of failure to remit as required by his contract the agent would not be guilty of a crime, but would simply be subject to a civil liability for breach of contract. He was the agent of the company for receiving premiums and he received them. They were received by him for the company and the proceeds, in some form, became the property of the company just as really as if they had been paid to the treasurer of the company. A failure by the agent to remit premiums collected can no more entitle such premiums to be treated for any purpose as not received than could the act of the treasurer of the company in appropriating to his own use funds received in payment of premiums. Clearly, at the end of the year the company has balances due from its agents, but these balances represent premiums received as well as premiums which have not been received, which last are still owed by the policyholder and for which the agent is not liable until actually collected. This being true the cases cited by counsel dealing with the criminal and civil liability of agents and the form of actions which can be predicated upon such liability are of no significance in this case. A thing which has ceased to be a premium can not be treated as an uncollected premium regardless of what remedy the company may have against a defaulting agent.

Counsel for appellant, however, cite two cases which they say are the only cases which they have found dealing with the question as to whether premiums received by agents are to be treated as received by the company. When these cases are examined they by no means support the contention of appellant. In *Mutual Benefit Life Insurance Company* v. *Herold*, 198 Fed. 199, the district judge held, as did the Court of Claims in this case, that uncollected premiums, like uncollected claims of any other kind, were not to be treated as income. That case was tried upon an agreed statement of facts. This statement referred to both "uncollected" and "deferred" premiums. It defined the former as "premiums which have fallen due, but concerning the payment of which the company has not been advised at its home office," and the latter as premiums which are payable in semiannual or quarter-annual installments. The court said:

> It seems almost to border upon absurdity to speak of income as including that which has not been received, and which in the ordinary uncertainties of business may never be received. How can it be affirmed of unpaid interest that it will ever be paid, or, if so, when? The same is true of uncollected and deferred premiums. It is manifestly impossible to tell when, if ever, they will be paid. The policyholder is under no legal liability to pay them. He may neglect or refuse to pay them, and thereby lapse his policy. But that is all; he can not be sued for them; they are not debts. The company, therefore, properly refuses to treat such unpaid items as receipts. They are neither receipts nor income until paid. My conclusion is that the act contemplates that the required statement shall be made upon a cash basis; that is, upon a basis of money actually received and ex-

> penditures actually paid during the current year. (P. 216.)

It will be observed that this statement by the court, so far as premiums are concerned, is limited to premiums not collected from the policy holder, and there is no discussion anywhere in the opinion of the status of premiums which have been collected by being paid to an agent of the company. What is quoted above is entirely applicable to premiums which have not been paid, but in no sense applicable to those which have been paid. A reading of the opinion makes it clear why there was no discussion of premiums which had been paid to agents. There was no such question before the court and no occasion for discussing it. The stipulation upon which the case was tried concluded with an agreement as to the amount for which a recovery should be had in the event the court decided each or any of the contentions in favor of the company. These matters were set out in detail and included an agreement as to what the recovery should be "if the court finds that the plaintiff's returns were correctly made upon a 'cash' basis," as follows (id. 217):

(*a*) For deferred premiums (Agreed Facts, par. 14)	$1, 499. 69	
(*b*) For interest due or accrued, but uncollected (Agreed Facts, par. 15)	3, 041. 94	
(*c*) For matured endowment policies	49. 02	
		$4, 590. 65

It will be seen that under this stipulation there could in no event have been a recovery for premiums collected, but not reported by agents, for the reason that recovery as to premiums was limited by agreement to *deferred* premiums defined above. The question now involved, therefore, was not before the court. In fact, the court, with apparent care, avoided any reference to it.

The other case is *Crookston Bros.* v. *Furtado,* 5 Great Britain Tax Cases, 602. In that case it was sought in Great Britain to levy a tax upon factors or brokers in England in order to reach the profits of a French corporation, whose goods were being sold in England through these factors. The act authorized the assessment to be made against agents of foreign companies "having receipt of any profits or gains * * * belonging to" such corporation. The questions presented for decision were: (1) Whether the French company exercised a trade within the United Kingdom which rendered its agents liable to be assessed? (2) Whether these agents were factors, agents, or receivers "having the receipt of the profits or gains of the company" within the meaning of the act? There was some difference of opinion among their lordships as to whether the company was exercising such a trade as made its profits subject to tax, but they were all agreed that the agents in question were not such agents as were contemplated by the law. It was said that—

> the agent, therefore, can not be assessed unless he is or ought to be in receipt of moneys belonging to his foreign principal." (Page 625.)

And it was held that these agents were not in receipt of such moneys for the reason that under the method of doing business they merely received checks payable to the French company, and immediately forwarded these checks by mail, and when, occasionally, a check was made payable to the agents themselves they indorsed it to the French company and forwarded it.

This holding can give no comfort to the appellant. The agents in question in that case had no money of their principals in their possession because they had received none. The inference is clear that if they had received money paid by purchasers of their principal's goods, the money which they would then have had in their possession would have been money belonging to their principal. So, in this case, whatever the technical rights of the company and its agents as between themselves may have been, when the agents collected money belonging to the company and, according to the terms of their contracts, retained it in their possession for a time, they were in possession of moneys belonging to the company which they had received for the company, and which, therefore, within the meaning of the revenue act, had been received by the company.

Having failed to show how much of the unreported premiums for each year was, in fact, uncollected premiums, and being entitled to a deduction for only such premiums as had not been paid, the appellant failed to furnish evidence upon which any judgment in its favor could be rendered on this account. The court did it no injustice and took no advantage of it.

On the contrary, after holding that no sufficient evidence had been produced to warrant a judgment, and calling attention to the fact that it was necessary to show what premiums had not been paid to agents, the court remanded the case to the rules in order to give appellant an opportunity to furnish the necessary proof. When, instead of offering such proof, appellant asked for additional findings of fact on the record as it stood, the court again remanded the case in order to give appellant another opportunity. It still failed to produce any sufficient evidence and the court rendered the only judgment it could render. With its eyes open, therefore, appellant deliberately chose to stand upon its contention that it was entitled to deductions for all *unreported* as distinguished from *uncollected* premiums. It is submitted, therefore, that the judgment of the Court of Claims must be affirmed, unless upon the record appellant is entitled to recover some amount on account of the disallowance of deductions claimed as additions to reserve funds required by law.

APPELLANT'S CONTENTION AS TO RESERVE FUNDS.

Appellant advances the startling proposition that all the assets which it is required to possess as a condition precedent to doing business in any State constitute reserve funds within the meaning of the revenue law. And since no State will permit the carrying on of insurance business unless the comcompany can show that it is possessed of assets at least sufficient to satisfy its outstanding liabilities, the insistence is that the reserve funds consist of the total of the items which appear in its financial statement under the head of "Liabilities." Appellant therefore says that when its outstanding indebtedness of any kind increases during a given year it is required by law to add the amount of the increase to reserve funds and is entitled to deduct the same from "gross income" in its tax returns.

To illustrate: The amount which it owed for salaries was $15,295.14 greater at the close than at the beginning of 1910. Salaries paid during the year were, of course, deducted as a part of the expenses of conducting the business. But such as, though accrued, were unpaid were merely outstanding indebtedness and could not be deducted from the income of that year as paid. If the amount had been no more than at the beginning of the year, it is conceded that no deduction of any kind could have been made. But because the amount had increased during the year a deduction of $15,295.14 is claimed as an addition to reserve funds. These unpaid salaries, of course, were paid in the year 1911 and deducted as expenses from the gross income of that year. If therefore, appellant's construction of the law prevails, it gets a deduction from the income of each of two years for the same item of indebtedness, which is deducted first because it represents an increase in outstanding indebtedness and later because it has been paid as an expense of the business. This would imply an intention on the part of Congress which will scarcely be imputed unless clearly and unavoidably indicated by the language of the act.

Reserve Funds on Account of Which Deductions Are Allowed Are Not Funds Held to Pay Ordinary, Definite, and Fixed Liabilities, Whether Due or Not; but Only Those Funds Estimated to be Sufficient to Meet the Uncertain and Undetermined Liabilities Which May be Expected to Result From the Issuance of Policies of Insurance and Which are Required by Law to be Maintained for the Protection of Policyholders.

Under the general scheme of the act of 1909 the method of ascertaining the net taxable income is to strike a balance between the gross income and the amounts of deductions and credits allowed by law. In gross income are included items actually received, and, in general, the deductions are only for items actually paid out. Income earned but *not received* is not included, nor are obligations for expense and similar matters *accrued but not paid* included in deductions. Insurance companies enjoy the distinction of alone being entitled to make deductions representing, in any case, outstanding and unpaid obligations. This results from the provision allowing deductions on account of net increases in reserve funds required by law.

Just why this exception should have been made in favor of insurance companies is not altogether clear. The so-called reserve funds are not specifically set aside and pledged for the payment of any particular class of obligation. On the contrary, they constitute simply a part of the general assets of the company, are invested in income-bearing securities on which the company receives the income, and, in case of insolvency, constitute general assets for the payment alike of obligations of all classes. Congress, however, has expressed the purpose to allow deductions for so much of each year's income as may be required to maintain these reserves. The question, therefore, is, What reserves are required by law to be maintained and what additions are required to be made to them each year?

To refute appellants' contention it would seem to be necessary only to call attention to the nature of reserve funds as applied to insurance companies. Reserves or reserve funds required by law have grown out of the efforts of the various States to regulate and render safe the insurance business and out of the exigencies and necessities of that business. The capital of corporations engaged in most lines of business is, in the very nature of things, largely invested in tangible property employed in the business and held subject to its debts. But an insurance company employs little tangible property in its business. A large capital is needed principally to get credit and to stand as security for the payment of its obligations. Being usually invested in intangible assets it can be easily dissipated without the knowledge of those who deal with the company. The States therefore long ago took steps to make the insurance business safe. They have not seen fit, however, to require any specific part of the assets to be set aside and specially pledged to the payment of amounts due policyholders as against other obligations of the company, but they have taken an oversight and control of the business to the extent of requiring that the State officials shall be furnished satisfactory evidence that the company has sufficient assets to satisfy its obligations and that these assets are of such a nature as to insure prompt payment of obligations as they mature.

Ordinarily it is not difficult to determine from the books of a corporation, if correctly kept, and a valuation of its assets whether it is solvent or insolvent. All that is necessary is to list its debts, whether due or not, and strike a balance. And this balance sheet is the basis of all State insurance laws. The assets are listed and valued just as would be done in determining the financial condition of any other corporation. The difficulty comes in properly listing the liabilities. In the conduct of its business an insurance company, just like other corporations, may and does incur indebtedness of a fixed and definite nature, such as for salaries, commissions, taxes, rent, supplies, advertising, borrowed money, and various other things. These items are, of course, listed without difficulty. But the bulk of its obligations are those which it assumes by issuing policies of insurance. These are contingent and uncertain in amount. Manifestly they can not be omitted from a statement upon which solvency is to be determined. Otherwise a company with only a few thousand dollars of assets would be shown to be solvent, although it might have millions of dollars of outstanding insurance upon which a large amount of liability is sure to accrue. But how are they to be listed? The limit of possible liability is shown by the faces of the outstanding policies. This amount, however, can not be carried into a financial statement as an actual liability, for that would show as insolvent any insurance company in the world. No company is ever called on to pay the full amount of all the policies it issues. On many of these, especially fire and accident, it never has to pay anything. On many others it pays only a small fraction of the amount insured.

It is, therefore, neither practicable nor reasonable to require an insurance company to have assets in excess of what is necessary to make fairly certain the payment of such sums as it is likely to be called on to pay under its outstanding policies. If this amount, whatever it may be, is listed as a liability, the financial condition of the company will be reflected with reasonable certainty. But how and by whom is the amount to be determined? Manifestly, it would not be fair to the policyholders to accept any estimate the company chooses to make. Nor would it be fair to the company to leave it to the unguided judgment or discretion of the insurance commissioner. The plan adopted, therefore, has been to permit liabilities of this kind to be listed at such an amount as the insurance commissioner, guided by rules laid down by statute law, determines to be necessary.

So many different kinds of insurance are written and the probable amount of liability to be expected under different kinds of policies varies so much that it would be impossible to apply the same rule to all kinds of insurance in determining the amount necessary to be held in reserve to secure the payment of the amounts which will probably become payable.

The laws of the various States on this subject do not differ greatly, and the laws of the State of New York will be used as fairly representative of the situation. Manifestly, the insurance business can not be carried on with safety to policyholders unless the policies are issued by a company possessed of sufficient assets to meet all obligations, in addition to the ordinary expenses of conducting the business, which may reasonably be expected to arise out of its contingent liability to policyholders. The plan adopted, therefore, is not to permit insurance companies to conduct business or issue policies until they have satisfied the proper State official that the relation between their assets and their liabilities is such as to give sufficient security for the payment of their policies. In order to be in this condition, they must have sufficient assets to meet all the other fixed and definite obligations and then have left assets equal in value to the amount which it may fairly be estimated is necessary to insure the payment of the contingent liabilities which will probably arise out of their policies. This remainder, after deducting from the value of their assets the amount of their ordinary and definite liabilities, is what the statutes denominate the reserve which the companies are required to maintain.

As a further security for continued solvency and ability to pay it is usually required that the capital of the company shall be kept intact and that it shall have, in addition to its capital, the necessary assets to meet its ordinary obligations and to leave the required reserve for contingent liabilities. In the case of life insurance companies, the amount of this reserve is fixed at the amount which has been ascertained to be, under certain rules adopted as the result of experience, the present value of all outstanding policies, with the further provision, applicable to various kinds of insurance companies, that the company shall be deemed to be insolvent when its assets and credits are not sufficient to reinsure its outstanding risks in a solvent insurance corporation. (Consolidated Laws of New York, vol. 3, secs. 21 and 84.)

In the case of casualty and liability companies there are two items of contingent liabilities growing out of the issuance of policies. Like life insurance, premiums for casualty and liability insurance are usually paid in advance. In the case of life insurance there are ordinarily no contingencies under which the company is required to return any part of premiums so collected. But casualty, liability, and some other kinds of insurance premiums are collected subject to a liability to return, in certain contingencies, such as the cancellation of the policy, a part of them as unearned premiums. Companies of this kind are likewise subject to the requirement that their assets shall at all times be sufficient to reinsure their outstanding risks, if necessary, in some solvent company. Very generally, therefore, the State laws require that in the financial statement of such companies there shall be included as a liability a fund estimated under fixed rules to be sufficient for both of these purposes, and this estimated amount is commonly called "The unearned premium reserve." In other words, the company is required by law to have assets sufficient to pay all its fixed and ascertained liabilities and then have in reserve assets sufficient to provide a fund large enough to insure the payment of any unearned premiums for which it may become liable and to reinsure its risks, if necessary. (Consolidated Laws of New York, vol. 3, sec. 86, p. 1823.)

The other contingent liability to which such companies are subject is for the payment of claims which have arisen in case of losses under the terms of its policies. It will be observed that in the case of life insurance companies a reserve for this is not required. The reason is that it has been deemed sufficient to require such companies to maintain a reserve equal to the present value of its outstanding policies. The amount of liability in each policy is definitely fixed in the event of the happening of the contingency which makes the policy payable. Hence, ordinarily when a claim is made under a policy, the company is liable for the full amount of the claim unless it is able to show that for some reason it is not liable at all. Such claims, when unpaid, therefore, and until nonliability has been established, are required to be listed as ordinary debts arising in the course of the business. And it is not deemed necessary to provide a special reserve fund for their payment, though if liability is fixed and they are not promptly paid the company's license to do business will be revoked. The same is very generally true of fire insurance, and also of ordinary accident insurance, and various kinds of insurance written by casualty companies. But in the case of employers' liability insurance, under which the amount to be paid depends upon what compensation persons are entitled to receive for personal injuries, the full amount of the claim as presented is rarely paid. Moreover, these claims are frequently not paid until after the employee has sued the employer and obtained a judgment.

It is well known that when suits of this kind are commenced it is just as easy to sue for a very large amount as for a small amount, and no more expensive. The amount sued for, therefore, generally bears no real relation to the amount finally recovered. And in many cases recovery is entirely defeated. To require a liability insurance company, therefore, to list as actual liabilities the full amount of claims presented for payment would be almost, if not quite, as prohibitive as to require life insurance companies to list the amounts called for in the faces of their policies. Nor would a financial statement so made reflect, with any degree of truth, the actual condition of a company or its ability to meet its obligations as they accrue. Very generally, then, the States have enacted laws prescribing rules, based upon the experience of this line of business, by which the insurance commissioner is required to make an estimate of the amount which will likely be necessary to satisfy outstanding claims arising under liability policies. And this estimated amount is required to be carried as a liability in the company's financial statement. In other words, like the unearned premium reserve, the special reserve for liability loss claims is ascertained by deducting from the assets of the company the amounts necessary to satisfy the ordinary outstanding indebtedness of the company, and what is left is regarded as the amount held in reserve to secure the payment of such claims. That this is all that is meant by the reserves required by law is made plain by the language used in the New York statute, as follows:

> In estimating the condition of any casualty insurance corporation, under the provisions of this chapter, the superintendent shall allow as assets only such investments as are authorized by the existing laws of this State, at the date of its investigation; and shall charge as liabilities, in addition to the capital stock, all outstanding indebtedness of the corporation, and the premium reserve on policies in force, equal to the unearned portions of the gross premiums charged for covering the risks, computed on each respective risk from the date of the issuance of the policy. There shall also be charged as a liability to each company which undertakes or writes insurance under subdivision 3 of section 70 of this act, whether organized under this or any other State or country, a further reserve as hereinafter provided. (Consolidated Laws of New York vol. 3, p. 1823.)

The companies writing insurance under subdivision 3 of section 70 are companies writing liability insurance. And the reserve last referred to in the above quotation is the reserve for the purpose of meeting liabilities for losses under their policies, the method of ascertaining which is fully set out in the statute. The result is, as stated above, that there are no reserve funds represented by specific assets set apart for that purpose. The reserves consist merely of the remainder of the assets of the company after all the indebtedness and liabilities other than those intended to be protected by the reserve have been provided for. In other words, the reserve is impaired whenever the total amount of their liabilities deducted from the assets does not leave an amount equal to the required reserve. To say that these other items of indebtedness must be deducted from the assets in order to ascertain what reserves the company has would be to impute to Congress an intention contrary to the ordinary meaning of the language used and which it surely could not have intended.

With one or two exceptions, which will be noted below, the statutes of the States do not provide for a reserve fund for outstanding claims of casualty companies arising under policies other than liability policies, probably for the reason stated above. At any rate, such claims are treated in the financial reports required by the various insurance commissioners as ordinary indebtedness of the company.

It will be seen, therefore, that the so-called reserves or reserve funds are universally required only for the protection of policyholders and only to insure the ability of the company to meet such obligations as are reasonably to be expected to accrue in the future to policyholders, and that, generally, no such reserve is required to protect the holders of claims against casualty companies growing out of policies other than liability policies.

The claim made in this case that the reserve funds required by law to be kept are to be measured by the amount of the outstanding indebtedness of all kinds of the company possesses the virtue of novelty. It certainly has not, so far as we have been able to find, been recognized or enacted into law by any of the numerous States whose legislatures have dealt with insurance business.

The requirement that there shall be a reserve fund does not serve to increase the total of the items which must be carried in the company's financial statement as liabilities. On the contrary, it permits the substitution in these reports of a smaller estimated amount for the larger amount that would otherwise be fixed by the amounts claimed. It is not claimed that the statutes of any State have ever expressly provided for a reserve fund to meet such ordinary indebtedness as salaries, taxes, commissions, etc., or permitted the substitution, in financial statements, for the actual amount of such unpaid indebtedness, of any smaller estimated amount. Clearly, then, the Commissioner of Internal Revenue was right in refusing to treat, as additions required by law to be made to reserve funds, any increase in indebtedness of this kind. And it is to be remembered that the increase in these items claimed as deductions is an increase in the actual amount for which the company was liable.

Leaving out of consideration, for the moment, the statutes of Wisconsin and Pennsylvania, the case for the Government is equally clear as to the claim for deductions on account of the increases in unpaid losses under policies other than liability policies. The deductions thus claimed are for increases in the actual amount of outstanding claims and not increases in the smaller amount estimated to be necessary to take care of these claims. Except in the two States mentioned, it is not claimed that any State has expressly by statute required or authorized a reserve for this purpose, or permitted its insurance commissioner to accept a financial statement which listed the liability on this account at a smaller amount than the total of outstanding claims. In other words, the company is required, for the purpose of determining its solvency, to treat such claims as liabilities. Hence, in its claim for deduction, the claim is not made, as in the case of claims under liability policies, for increases in the special reserve required or authorized, but for increases in the actual amounts demanded on such claims. The amount of assets which it is required to have for this purpose, therefore, is not a special reserve fund for that purpose, but simply a part of the assets which must be deducted from its total assets in order to ascertain whether it has the reserve required to meet other liabilities which are regarded as contingent and uncertain. It is not required to have a reserve fund within the meaning of the statute for this purpose, and the commissioner's ruling was correct unless the result is to be affected by the statutes of either Wisconsin or Pennsylvania. The Wisconsin statute, which was in force prior to 1909, and which is printed in the appendix to appellant's brief, contained this provision:

> Section 1966-47. Reserve Liability.—In computing the reserve liability of casualty insurance and suretyship corporations the commissioner of insurance shall make such calculations as in his judgment are equitable and just to both policyholders and the company: *Provided,* That such liability so determined shall not be less than fifty per cent of the premiums written in the company's policies.

It may be said that this language is broad enough to provide for a reserve for loss claims on all policies issued by casualty companies.

In Pennsylvania, as in all other States, except Wisconsin, during the years 1909 and 1910 there was no provision for a reserve for policy claims of casualty companies except claims under liability policies. But in 1911 a statute was passed providing for such a reserve and prescribing the method by which it should be calculated. (Laws of Pennsylvania of 1911, secs. 8 and 9, p. 613.) Assuming that during all the years involved in this litigation there was at least one State which authorized a reserve of this kind, the result was that in that State the company was not required, in order to do business, to have a *larger* amount of assets than was required for the same purpose in other States; but, on the contrary, was permitted to do business with a *smaller* amount of assets, for the reason that it was permitted to substitute, in its financial statement, for the larger amount required in other States, the smaller amount which in that State was estimated to be sufficient.

Moreover, the amounts stated in the tax returns as a basis for these deductions do not represent any reserve fund fixed according to the laws of either Wisconsin or Pennsylvania, but the figures used are those required in the financial statements submitted to the insurance departments of the other States. The increases set out, therefore, are not increases in the reserves required in Wisconsin or Pennsylvania, but merely increases in the total amount of outstanding claims. It does not appear that the commissioners of either of the two States mentioned ever fixed or determined what amount of reserve should be carried for this purpose. Obviously, there was no occasion for so doing, for the reason that the financial statement submitted showed a larger amount of net assets than might have been required in those States. Since the company at all times necessarily had assets beyond the requirements of the laws of these two States, it can not be said that the effect of those laws was to require any addition to reserve funds, and the claim for deduction was properly rejected. It was properly rejected for the further reason that a mere statement of the increase during a particular year of the outstanding claims can not be treated as fixing or establishing the additional amount required by any law to be held in reserve for the satisfaction of such claims.

Since the statute of Pennsylvania was not enacted until 1911, appellant now advances a claim, not made in its return, namely, that the effect of that statute was to require an addition to reserve funds for the year 1911 equal to the full amount of its outstanding claims of this kind, or $215,924.14, in addition to the amount of increase claimed in its return. This claim is made upon the theory that no such reserve had previously been required, and hence the total amount was required to be added during that year. Of course, what has just been said disposes of this contention. The amount sought to be deducted is the total amount of outstanding claims and not the amount of any special reserve fund fixed by the commissioner of Pennsylvania, if, in fact, he ever fixed any, which does not appear. Moreover, as we have seen, the Wisconsin statute did authorize in previous years a reserve for the same purpose, and for every year, beginning with 1909, a deduction has been sought for the increase in the amount of such claims.

QUESTION OF THE TAXABILITY OF 1908 PREMIUMS COLLECTED IN 1909 NOT INVOLVED.

In its original returns for 1909, appellant included $584,164.18 of premiums on policies written in 1908 but not collected until 1909. In its original payment, therefore, it paid a tax upon this amount. It now claims that this was income which accrued prior to the effective date of the act, January 1, 1909, and therefore not subject to taxation. Whether this is correct or not is now wholly immaterial. The amount paid at that time was afterwards credited on the final assessments as made. These assessments did not include as income for 1909 any part of the premiums on policies written in 1908. When, therefore, appellant was allowed credit on the final assessment for the amount so paid it received back that amount and had it applied in part payment of that for which it was legally liable The final assessments were based entirely upon insurance written after January 1, 1909. So far as the gross income is concerned, they are conceded to have been correct except for any amount which the appellant may have shown was included in any year's income which had not been collected at the end of that year, and, as shown above, there has been a total failure to show any such amount. The question therefore raised as to the taxability of 1908 premiums is wholly unimportant and beside the case.

1912 PREMIUMS COLLECTED IN 1913.

There is also discussion in appellant's brief of the taxability in 1913 of premiums on policies written in 1912, but not collected until after the end of that year. The record, however, does not present a case which makes it necessary to determine this question. Beginning with 1913, the act of 1909 was superseded by the revenue act of 1913. The income tax amendment to the Constitution was not in effect on January 1, 1913, but took effect some two months later. In the revenue act of 1913, therefore, for the months of January and February, the excise corporation tax of 1909 was, in effect, continued in force; and for the remaining 10 months of that year a straight income tax was levied, the rate of taxation, however, being the same. It is said that Congress had no power to levy an income tax of this kind prior to the adoption of the amendment. This is true, and is the very reason why the taking effect of the income feature of the act was postponed until March 1, 1913. The result was that up to that date the appellant was subject to an excise tax and subsequently to the income tax. If the question suggested could be raised, it is applicable to premiums accruing before March 1, 1913, and not to those accruing before January 1, 1913. There was no effort made to show what premiums were unpaid on the former date, or even what amount was unreported by agents. All that appears is that a certain amount was unreported by the agents on January 1, 1913. The appellant, therefore, has failed to show any amount for which judgment could be rendered in its favor on account of premiums which accrued but were not collected while the excise tax was in force.

RELEASED RESERVE FUNDS.

During the year 1913 there was a large decrease in the special reserve for unpaid liability losses. In its original return the appellant treated the amount of this decrease as an increase in income, and the commissioner so treated it in making the final assessment. The claim is now made that this should not be treated as income. During the years in question, some of the alleged reserve funds for which deductions were claimed showed decreases in certain years. The amounts in these decreases were deducted from the total amount claimed as additions to reserve funds. It is admitted that this was proper, but it happens that the decrease in reserves for liability claims in 1913 exceeded the total amount of claims for additions to other reserve funds. Appellant concedes that this decrease can be used to the extent of wiping out all its other claims for deductions on account of additions to reserve funds, but says that the balance of the decrease can not serve to increase its taxable income for that year. This net decrease left in appellant's hands, free from the claims of reserve funds previously fixed upon it, a considerable sum of money. This money, it is true, had been received prior to 1913, but because it was required to be kept in reserve Congress had seen fit to enact that it should not be treated as received as taxable income. When it was released from the reserve fund it assumed, for the first time, the status of other income of the company and can fairly be said to have been then, for the first time, received as income.

Giving the most liberal construction to the action of Congress, it can not be inferred that it ever intended that any income of an insurance company should escape taxation except so long as it was required by law to be held in reserve. It is therefore submitted that when in 1913 it was no longer required for this purpose, it was then, for the first time, received as income and became taxable as a part of the income of that year. This was the view taken by the Court of Claims and it is submitted that there was no error in the holding.

STATUTE OF LIMITATIONS.

Appellant has discussed at some length the statute of limitations, but the Government's case has been presented upon the theory that this suit was, at all events, begun in time to enable the appellant to recovery for any amount shown to have been illegally collected on the final assessment provided the amount so shown does not exceed for any year the additional payments made under the final assessment. It being plain that no right to recover anything in excess of any of these additional payments has been established, it is not deemed necessary to discuss the statute of limitations as applied to the payments originally made and afterwards credited on the final assessment.

CONCLUSION.

It is respectfully submitted that upon this record the appellant is not entitled to recover anything, and the judgment of the Court of Claims should be affirmed.

Respectfully,

William L. Frierson,
Assistant Attorney General.

October, 1919.

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Where the Government imposed and collected the tax on all premiums written during the year, the company, claiming refund of part as erroneously assessed on premiums not received, must show what premiums were received during the year. P. 347.

Reserves which are required by state insurance departments in the exercise of statutory authority, are "required by law" within the meaning of the Excise and Income Tax Acts, *supra*, where they provide that net additions, required by law to be made within the year to reserve funds, may be deducted from gross, in determining net income. P. 348.

The term "reserve funds," as used in these acts, *held* to include an "unearned premium reserve," to meet future liabilities on policies; a "liability reserve," to satisfy claims indefinite in amount and as to time of payment, but accrued, on liability and workmen's compensation policies; and a "reserve for loss claims," accrued on other policies; but not to include funds required by state authority to be maintained to meet ordinary running expenses, such as taxes, salaries, re-insurance and unpaid brokerage. P. 349.

If an insurance company in one year makes an over-estimate of reserve requirements and so an excessive deduction from gross income, *semble*, that such excess may be treated, under these tax acts, as income of the year in which it is subsequently released to the general uses of the company. P. 351.

But amounts once deducted from gross income and added to reserves, under these acts, can be treated by the Government as income of a subsequent year for the purpose of computing the tax, only where it can be clearly shown that subsequent business conditions have released them to the free beneficial use of the company in a real, and not in a mere bookkeeping, sense. P. 352.

A claim for refund of money paid with original returns made under the above-mentioned tax acts, is barred if not presented to the Commissioner, as directed by Rev. Stats., § 3226, and sued on in the Court of Claims within the two-year limitation of § 3227; and these requirements are not postponed or superseded as to such payments by the facts that the original returns were amended and the assessments increased and the original payments credited upon the increased assessments, by the action of the Commissioner. *Cheatham* v. *United States*, 92 U. S. 85, distinguished. Act of September 8, 1916, c. 463, § 14, 39 Stat. 772, *held* inapplicable. P. 353.

52 Ct. Clms. 201, 288; 53 *id.* 81, modified and affirmed.

THE case is stated in the opinion.

Mr. Burt E. Barlow, with whom *Mr. Abram R. Serven* was on the brief, for appellant.

Mr. Assistant Attorney General Frierson for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

Under warrant of the Act of Congress, approved August 5, 1909, c. 6, 36 Stat. 11, 113, the Government collected from the claimant, a corporation organized as an insurance company under the laws of Maryland, an excise tax for the years 1909, 1910, 1911 and 1912, and, under warrant of the Act of Congress of October 3, 1913, c. 16, 38 Stat. 114, 166, it likewise collected an excise tax for the first two months of 1913, and an income tax for the remaining months of that year.

This suit, instituted in the Court of Claims, to recover portions of such payments claimed to have been unlawfully collected, is here for review upon appeal from the judgment of that court.

The claimant was engaged in casualty, liability, fidelity, guaranty and surety insurance, but the larger part of its business was employers' liability, accident, and, in the later of the years under consideration in this case, workmen's compensation insurance.

By process of elimination the essential questions of difference between the parties ultimately became three, viz:

(1) Should claimant be charged, as a part of its gross income each year, with premiums collected by agents, but not transmitted by them to its treasurer within the year?

(2) May the amount of gross income of the claimant be reduced by the aggregate amount of the taxes, salaries, brokerage and re-insurance unpaid at the end of each year, under the provisions in both the excise and income

tax laws allowing deductions of "net addition, if any, required by law to be made within the year to reserve funds"?

(3) Should the decrease in the amount of reserve funds required by law for the year 1913 from the amount required for 1912 be treated as "released reserve" and charged to the company as income for 1913?

Of these in the order stated.

First: Section 38 of the Excise Tax Act (36 Stat. 112) provides that every corporation, organized under the laws of any State as an insurance company "shall be subject to pay annually a special excise tax with respect to the carrying on or doing business . . . equivalent to one per centum upon the entire net income . . . *received by it* from all sources during such year."

The Income Tax Act (38 Stat. 172) provides [§ G, paragraph (a)] that the tax shall be levied upon the entire "net income *arising or accruing* from all sources during the preceding calendar year." But in paragraph (b), providing for deductions, gross income is described as that "*received* within the year from all sources." So that, with respect to domestic corporations, it is clear enough that no change was intended by the use of the expression "arising or accruing" in the Income Tax Act, and that the tax should be levied under both acts upon the income "received" during the year. *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330, 335.

The claimant did business in many States, through many agents, with whom it had uniform written contracts which allowed them to extend the time for payment of the premiums on policies, not to exceed thirty days from the date of policy, and required that on the fifth day of each calendar month they should pay or remit, in cash or its equivalent, the balance due claimant as shown by the last preceding monthly statement rendered to it.

Under the provisions of such contracts obviously the agents were not required to remit premiums on policies written in November until the fifth of January of the next year and on policies written in December not until the following February.

Much the largest item of the gross income of the company was premiums collected on policies of various kinds. Omitting reference to earlier and tentative returns by the claimant and amendments by the Government, it came about that claimant took the final position that the only premiums with which it could properly be charged as net income "received by it . . . during each year" were such as were collected and actually paid to its treasurer within the year. This involved omitting from gross income each year "premiums in course of collection by agents, not reported on December 31st," which varied in amount from $584,000 in one year to $1,020,000 in another. The amount, if deducted one year, might appear in the return of the claimant for the next year, but the rate might be different.

The Government, on the other hand, contended that the claimant should return the full amount of premiums on policies written in each year, whether actually collected or not.

The Court of Claims refused to accept the construction of either of the parties and held that the claimant should have returned, not all premiums written by it, but all which were actually received by it during the year and that receipt by its agents was receipt by the company, within the meaning of the act of Congress.

The claimant contends that premiums paid to its agents but not remitted to its treasurer were not "received by it during the year," chiefly for the reason that while in possession of the agents the money could not be attached as the company's property (*Maxwell* v. *McGee*, 66 Massachusetts, 137), and because money, while thus in the possession of agents was not subject to beneficial use by the claimant and therefore cannot, with propriety, be said to have been received by it, within the meaning of the act.

On the other hand it is conclusively argued: That payment of the premium to the agent discharged the obligation of the insured and called into effect the obligation of the insurer as fully as payment to the treasurer of the claimant could have done; that in the popular or generally accepted meaning of the words "received by it" (which must be given to them, *Maillard* v. *Lawrence*, 16 How. 251), receipt by an agent is regarded as receipt by his principal; that under their contract collected premiums in possession of the agents of the claimant were subject to use by it in an important respect before they were transmitted to the treasurer of the company, for the agency contract provided that "the agent will pay on demand, out of any funds collected by him for account of premiums and not remitted to the company, such drafts as may be drawn upon him by the company . . . for the purpose of settling claims, deducting same from his next succeeding monthly remittance;" and that only imperative language in the statute would justify a construction which would place it in the power of the claimant, by private contract with its agents, to shift payment of taxes from one taxing year into another.

The claimant withheld from its returns collections in the custody of its agents at the end of each year, and because in its amendments the Government had included all premiums written in each year whether or not collected, the Court of Claims, having reached the conclusion thus approved by us, allowed the claimant ninety days in which to show the amount of premiums received by it and its agents within each of the years in controversy, but the claimant failed to make such a showing, and thereupon the court treated the return of premiums written as the correct one and very properly, so far as this item is concerned, dismissed claimant's petition.

Second: In the same words the Excise and Income Tax Acts provide that "the net addition, if any, required by law to be made within the year to reserve funds" may be deducted from gross, in determining the amount of net, income to be taxed.

Finding its authority in this provision of the law the claimant in all of its returns treated as "reserves," for the purpose of determining whether the aggregate amount of them each year was greater or less than in the preceding year, and of thereby arriving at the "net addition to reserve funds" which it was authorized to deduct from the gross income, the following, among others, viz: "Reserve for unearned premiums," "Special reserve for unpaid liability losses," and "Loss claims reserve." Unearned premium reserve and special reserve for unpaid liability losses are familiar types of insurance reserves, and the Government, in its amended returns, allowed these two items, but rejected the third, "Loss claims reserve."

The Court of Claims, somewhat obscurely, held that the third item should also be allowed. This "Loss claims reserve" was intended to provide for the liquidation of claims for unsettled losses (other than those provided for by the reserve for liability losses) which had accrued at the end of the tax year for which the return was made and the reserve computed. The finding that the Insurance Department of Pennsylvania, pursuant to statute, has at all times since and including 1909 required claimant to keep on hand, as a condition of doing business in that State, "assets as reserves sufficient to cover outstanding losses," justifies the deduction of this reserve as one required by law to be maintained, and the holding that it should have been allowed for all of the years involved is approved.

But the Court of Claims approved the action of the Government in rejecting other claimed deductions of reserves for "unpaid taxes, salaries, brokerage and reinsurance due other companies." The court gave as its reason for this conclusion that the "net addition if any, required by law to be made within the year to reserve funds" which the act of Congress permitted to be deducted from gross income was limited to reserves required by express statutory provision and did not apply to reserves required by the rules and regulations of State Insurance Departments, when promulgated in the exercise of an appropriate power conferred by statute.

In this the Court of Claims fell into error. It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision. *United States* v. *Grimaud*, 220 U. S. 506; *United States* v. *Birdsall*, 233 U. S. 223, 231; *United States* v. *Smull*, 236 U. S. 405, 409, 411; *United States* v. *Morehead*, 243 U. S. 607. The law is not different with respect to the rules and regulations of a department of a state government.

But it is contended by the claimant that it was required to provide "reserves" for the payment of the rejected items of liability: because the Court of Claims found that pursuant to statutes the Insurance Department of Pennsylvania required the company, as a condition of doing business in that State, to keep on hand "assets as reserves" sufficient to cover all claims against the company "whether due or accrued"; because the department of New York required it to maintain "reserves sufficient to meet all of its accrued but unpaid indebtedness in each year"; and because the department of Wisconsin required it to carry "sufficient reserves to cover all of its outstanding liabilities."

MARYLAND CASUALTY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 73. Argued November 13, 1919.—Decided January 12, 1920.

Under the Income Tax Act of 1913, § G, (a), (b), as under the Corporation Excise Tax Act of 1909, the income taxable to a domestic corporation is limited to income "received" during the year. P. 345.

Under these statutes premiums collected in any year by the agents of an insurance company but not paid over to the treasurer of the company, are part of its income "received" in that year. *Id.*

Whether this contention of the claimant can be justified or not depends upon the meaning which is to be given to the words "reserve funds" in the two acts of Congress we are considering.

The term "reserve" or "reserves" has a special meaning in the law of insurance. While its scope varies under different laws, in general it means a sum of money, variously computed or estimated, which with accretions from interest, is set aside, "reserved," as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims, and claims accrued, but contingent and indefinite as to amount or time of payment.

In this case, as we have seen, the term includes "unearned premium reserve" to meet future liabilities on policies, "liability reserve" to satisfy claims, indefinite in amount and as to time of payment, but accrued on liability and workmen's compensation policies, and "reserve for loss claims" accrued on policies other than those provided for in the "liability reserve," but it has nowhere been held that "reserve," in this technical sense, must be maintained to provide for the ordinary running expenses of a business, definite in amount and which must be currently paid by every company from its income if its business is to continue, such as taxes, salaries, reinsurance and unpaid brokerage.

The requirements relied upon, of the Insurance Departments of New York, Pennsylvania and Wisconsin that "assets as reserves" must be maintained to cover "all claims," "all indebtedness," "all outstanding liabilities," in terms might include the rejected items we are considering, but plainly the departments, in these expressions used the word "reserves" in a non-technical sense as equivalent to "assets," as is illustrated by the Massachusetts requirement that each company shall "hold or reserve assets" for the payment of all claims and obligations. The distinction between the "reserves" and general assets of a company is obvious and familiar and runs through the statements of claimant and every other insurance company. That provision for the payment of ordinary expenses such as we are considering was not intended to be provided for and included in "reserve funds" as the term is used in the acts of Congress is plain from the fact that the acts permit deductions for such charges from income if paid within the year, and the claimant was permitted in this case to deduct large sums for such ordinary expenses of the business—specifically, large sums for taxes. The claimant did not regard any such charges as properly covered by "reserves" and did not so include them in its statement for 1909. In its 1910 return "unpaid taxes" and "salaries" first appear as "reserves," and in 1911 "brokerage" and "re-insurance" are added. This earlier, though it is now claimed to have been an uninstructed or inexpert, interpretation of the language of the acts, was nevertheless the candid and correct interpretation of it, and the judgment of the Court of Claims in this respect is approved.

Third: The year 1913 was the only one of those under consideration in which the aggregate amount of reserves which the claimant was required by law to keep fell below the amount so required for the preceding year. The Government allowed only "unearned premium" and "unpaid liability loss," reserves to be considered in determining deductions. In 1913 the "unpaid liability loss reserve" decrease, exceeded the "unearned premium reserve" increase, by over $270,000, and this amount the Government added to the gross income of the claimant for the year, calling it "released reserve," on the theory that the difference in the amount of the reserves for the two years released the decrease to the claimant so that it could use it for its general purposes, and therefore constituted free income for the year 1913, in which the decrease occurred.

This theory of the Government was accepted by the Court of Claims and the addition to the gross income was approved.

The statute does not in terms dispose of the question thus presented.

Reserves, as we have seen, are funds set apart as a liability in the accounts of a company to provide for the payment or reinsurance of specific, contingent liabilities. They are held not only as security for the payment of claims but also as funds from which payments are to be made. The amount "reserved" in any given year may be greater than is necessary for the required purposes, or it may be less than is necessary, but the fact that it is less in one year than in the preceding year does not necessarily show either that too much or too little was reserved for the former year,—it simply shows that the aggregate reserve requirement for the second year is less than for the first, and this may be due to various causes. If, in this case, it were due to an over-estimate of reserves for 1912 with a resulting excessive deduction for that year from gross income and if such excess was released to the general uses of the company and increased its free assets in 1913, to that extent it should very properly be treated as income in the year in which it became so available, for the reason that in that year, for the first time, it became free income, under the system for determining net income provided by the statute, and the fact that it came into the possession of the company in an earlier year in which it could be used only in a special manner, which permitted it to become non-taxable would not prevent its being considered as received in 1913 for the purposes of taxation, within the meaning of the act.

The findings of fact in this case, however, do not show that the diminution in the amount of required reserves was due to excessive reserves in prior years or to any other cause by which the free assets of the company were increased in the year 1913, and the following finding of fact makes strongly against such a conclusion:

"The decrease in employers' liability loss reserve for 1913, designated as 'released reserve' did not in any respect affect or change claimant's gross income or disbursements, as shown by the State Insurance Reports."

It would not be difficult to suggest conditions under which the statutory permit to deduct net additions to reserve funds would result in double deduction in favor of an insurance company, but such deductions can be restored to income again only where it is clearly shown that subsequent business conditions have released the amount of them to the free beneficial use of the company in a real, and not in a mere bookkeeping sense. If this seemingly favorable treatment of insurance companies is to be otherwise corrected or changed, it is for Congress, and not for the courts, to amend the law.

Since the findings of fact before us do not make the clear showing, which must be required, that the statutory deduction of net reserves in prior years was restored to the free use of the claimant in 1913, it should not have been charged as income with the decrease in that year, and, on the record before us, the holding of the Court of Claims must be reversed.

There remains the question as to the statute of limitations.

The Government concedes that the case is in time with respect to the amended returns but claims that it is barred by Rev. Stats., §§ 3226, 3227 and 3228, with respect to taxes paid on the original returns for all of the years but 1913. The claimant made its original returns without protest except for the year 1909 and, without appeal to the Commissioner of Internal Revenue, voluntarily paid the taxes computed on them for each of the years. Payment was made for 1909 in June, 1910; for 1910 in June, 1911; for 1911 in June, 1912; for 1912 in June, 1913. No claim for a refund of any of these payments was made until April 30, 1915, and then the claim was in general terms,

"For . . . amounts paid by it as taxes which, through lack of information as to the requirements of the law or by error in computation, it may have paid in excess of the amounts legally due."

This claim was rejected subsequent to the institution of this suit, which was commenced on February 8, 1916.

This statement shows the right of the claimant plainly barred by its failure to appeal to the Commissioner of Internal Revenue, Rev. Stats., § 3226 [this is fundamental, *King's County Savings Institution* v. *Blair*, 116 U. S. 200], and also by its failure to institute suit within two years after the cause of action accrued, Rev. Stats., § 3227.

The claimant contends that the amended returns filed by the Commissioner of Internal Revenue were not amendments or modifications of the original returns, but were based upon a different principle and, within the scope of *Cheatham* v. *United States*, 92 U. S. 85, constituted new assessments from which appeals were taken in time.

But they are denominated "amended returns" and while in dealing with the same items the basis of computation was in some cases varied, in each case the purpose and effect of them was to increase the payment which the claimant was required to make under the law and the payments made on the original returns were credited on the amounts computed as due on the returns as amended.

The inapplicability of *Cheatham* v. *United States*, 92 U. S. 85, is obvious, and the contention that the filing of the amended returns constituted the beginning of new proceedings which so superseded the original returns as to release the claimant from its entire failure to observe the statutory requirement for review of the latter is so unfounded that we cannot consent to enter upon a detailed discussion of it. This conclusion renders § 14 of the Act of Congress of September 8, 1916, c. 463, 39 Stat. 772, inapplicable.

It results that the judgment of the Court of Claims is modified, and as so modified affirmed, and the case is remanded to that court for proceedings in accordance with this opinion.

Affirmed with Modifications and Remanded.